LEGISLATIVE ENVIRONMENTAL ASSESSMENT: AN EVALUATION OF PROCEDURE AND CONTEXT WITH REFERENCE TO CANADA AND THE NETHERLANDS

by

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Declaration

Aspects of this thesis have been presented in the following publications:

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These publications were the direct result of research conducted as part of this doctoral program.

I declare that the work presented in this Thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information as duly acknowledged in the Thesis. To the best of my knowledge and belief no material previously published or written by another person is included, except where due acknowledgment is made in the text of the Thesis.

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Abstract

This thesis considers the application of Strategic Environmental Assessment (SEA) to legislative proposals, referred to here as Legislative Environmental Assessment (legislative EA). The objective of legislative EA is to contribute towards sustainable development. The purpose of the thesis is to identify developing processes of legislative EA which have the greatest likelihood of achieving this objective. The thesis examines whether such processes can and should be applied in Australia.

The first part considers the theory of SEA and systems of legislative EA. This examines the purpose, evolution, scope and difficulties of each process. Although SEA has been applied mostly to policies, plans and programs (PPPs) in the area of land use planning, more recently it has also been applied to legislative proposals. Experience with legislative EA in North America and Europe is analysed, to emphasise that it is of growing and significant international interest.

The second part focuses upon principles and criteria used to measure the procedural effectiveness of EA and SEA. This part develops a means of evaluating legislative EA based upon the use of additional criteria. It is argued that if legislative EA is to achieve its objective, these criteria need to include six key procedural aspects and take account of the context in which the procedures operate.

The third part examines legislative EA in detail in the jurisdictions which have used it most, Canada and the Netherlands. The procedures and underlying contexts of the Canadian *Cabinet Directive on the Environmental Assessment of Policy and Program Proposals* 1990 (the Directive), and the Dutch *Environmental Test* 1995 (E-test) are evaluated against the criteria developed in the second part. The evaluation illustrates the strengths and weaknesses of the use of legislative EA in each country, and the use that can be made of the evaluation criteria.

Conclusions are drawn which may usefully be applied to a number of jurisdictions, and which have specific application to Australia. The most important of these is that legislative EA contributes to the achievement of sustainable development. It is therefore necessary that: legislative EA is coordinated with other environmental policies; that environmental, economic and social impacts are integrated in the assessment; that assessments take place at the earliest possible time; and that adequate guidance is provided.

Other conclusions are that: EA procedures can and should be used for legislative EA; that the context in which legislative proposals are prepared and approved has a significant influence on the process; that legislative EA should be introduced by a policy rather than legal basis; that it is quite possible to evaluate legislative EA through the use of criteria; that legislative EA is more effective in the Netherlands than in Canada; and that Australia is in a good position to introduce legislative EA requirements of its own, and that it should do so without delay.

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Acronyms and Abbreviations

ACT	Australian Capital Territory
AOCP	*Administrative Order on Combustion Plants*
ANZECC	Australian and New Zealand Environment and Conservation Council
BC	British Columbia
BET	Business Effects Test
BIT	Business Impact Test
CBA	Cost Benefit Analysis
CCME	Canadian Council of Ministers of the Environment
CEA	Cumulative Effects Assessment
CEAA	Canadian Environmental Assessment Agency
CEARC	Canadian Environmental Assessment Research Council
CEC	Commission of the European Communities
CEPA	Commonwealth Environment Protection Agency
CEQ	Council on Environmental Quality
CEQA	*California Environmental Quality Act*
CESPA	*Canadian Endangered Species Protection Act* (proposed)
CIA	Cumulative Impact Assessment
COAG	Council of Australian Governments
CSD	Commission on Sustainable Development (UN)
CSIRO	Commonwealth Scientific and Industrial Research Organisation
CTPs	Commercial Timber Permits
DASET	Department of the Arts, Sport, the Environment and Territories
DEEA	*Decree governing the Disposal of Electrical and Electronic Appliances*
DG XI	Directorate-General for the Environment, Nuclear Safety and Civil Protection (CEC)
DIAND	Department of Indian Affairs and Northern Development
DLWG	Draft Legislation Working Group
DoE	Department of the Environment (UK)
DOE	Department of the Environment (Canada)

E-test	Environmental Test
EA	Environmental Assessment
EAP	Environmental Accountability Partnership
EARP	Environmental Assessment Review Process
EC	European Community
EEA	European Economic Area
ECE	Economic Commission for Europe
EEC	European Economic Community
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EMA	*Environmental Management Act*
EMS	Environmental Management Systems
EP(IP) Act	*Environmental Protection (Impact of Proposals) Act*
EPA	Environmental Protection Agency (US)
ES	Environmental Statement
ESA	Environmental Sustainability Assessment
ESD	Ecologically Sustainable Development
EU	European Union
FCEMS	Federal Committee on Environmental Management Systems
FEARO	Federal Environmental Assessment Review Office
FOI	Freedom of Information
GC	Governor in Council
HUD	Housing and Urban Development (US Department of)
IAIA	International Association for Impact Assessment
IEA	Integrated Environmental Assessment (or Institute of Environmental Assessment)
IEEP	Institute of European Environmental Policy
IGAE	Intergovernmental Agreement on the Environment
IISD	International Institute for Sustainable Development
IUCN	International Union for the Conservation of Nature
LEPs	Local Environmental Plans

MC	Memoranda to Cabinet
MDQ	Market Function, Deregulation and Quality of Legislation Initiative
MER	EIA Commission (Commissie voor de Milieu-Effectrapportage)
MINEZ	Ministry of Economic Affairs (Ministerie van Economische Zaken)
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NCSA	National Conservation Strategy for Australia
NEPA	*National Environmental Policy Act*
NEPPs	National Environmental Policy Plans
NGOs	Non-Governmental Organisations
NIBR	Norwegian Institute for Urban and Regional Research
NRTEE	National Round Table on Environment and Economy
NSDSs	National Sustainable Development Strategies
NSESD	National Strategy for Ecologically Sustainable Development
NSW	New South Wales
NT	Northern Territory
OECD	Organisation for Economic Cooperation and Development
OFES	Office of Federal Environmental Stewardship
OMB	Office of Management and Budget
PCE	Parliamentary Commissioner for the Environment
PCO	Privy Council Office
PPPs	Policies, Plans and Programs
PPRs	*Pulp and Paper Regulations*
PR	Proportional Representation
Qld	Queensland
RAC	Resource Assessment Commission
REPs	Regional Environmental Plans
RIA	Regulatory Impact Analysis
RIAS	Regulatory Impact Analysis Statement
RMA	*Resource Management Act*
SA	South Australia

SDSs	Sustainable Development Strategies
SEA	Strategic Environmental Assessment
SEIA	Socio-Economic Impact Analysis
SEPPs	State Environmental Protection Policies
SIA	Social Impact Assessment
SoERs	State of the Environment Reports
Tas	Tasmania
TBS	Treasury Board Secretariat
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
US	United States
Vic	Victoria
VROM	Ministry of Housing, Spatial Planning and the Environment
WA	Western Australia
WCED	World Commission on Environment and Development
WGTA	*Western Grain Transportation Act*
YTRs	*Yukon Timber Regulations*

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Chapter 1 - Introduction

> In a few countries, the formal EIA (or SEA) procedures apply to proposed laws or regulations. The utility of applying SEA to these actions is self-evident as all laws act to encourage or discourage certain types of human behaviour. Behavioural changes can, and often do, have significant environmental impacts. Laws/regulations which are directed at environmental protection or management (for example, hazardous waste disposal) should, also, be subject to SEA. It should not be assumed that a law or regulation aimed at environmental improvement will be entirely beneficial. There may be indirect adverse effects which are not immediately apparent unless a systematic assessment of impacts is undertaken. Such an outcome can easily arise if a problem in one environmental 'sector' - for example, disposal of hazardous waste on land - is managed only by transferring it to another sector (for example, air quality).[1]

1. Purpose

The purpose of this thesis is to evaluate the application of SEA to proposed bills and regulations. Termed 'legislative EA', the importance of this is set out in the reference above. This purpose is outlined in the three subsections below which are entitled: rationale and significance; objectives and limitations; and hypothesis and research questions. These describe what legislative EA is and why it is important, the aims and confines of this dissertation, and the research design employed in the following chapters. Each of the conclusions drawn in the final chapter relate to the research questions, and the answers to these questions should enable a determination to be made of whether this research has succeeded or not.

1.1 Rationale and significance

Legislative EA is the application of Environmental Assessment (EA, or Environmental Impact Assessment - EIA) to legislative proposals. Historically, it has its roots in policy analysis and the economic assessments of legislation undertaken in the early 1970s. More recently, it has developed as part of Strategic Environmental Assessment (SEA), the application of EA to policies, plans and programs (PPPs). There has been an overwhelming emphasis upon land use planning in SEA; however as experience has grown it has been recognised that if plan and program

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1 Scott Wilson Resource Consultants, 1996. *Environmental Impact Assessment: Issues, Trends and Practice*, Environment and Economics Unit, United Nations Environment Programme: Nairobi, p 60.

assessments are to be effective, then the policies that underlie them must also be assessed. As legislation is commonly used to implement policies, the utility of evaluating draft bills and regulations has been appreciated, and several governments have introduced assessment procedures.

Requirements for legislative EA are present in the following jurisdictions: the United States (1969), Canada (1990), Denmark (1993), Finland (1994), the European Union (1994), and the Netherlands (1995). Of these, only the American and Finnish provisions have a legal basis; the others are required by government policy decision. Each country contains additional SEA requirements: in the US and Finland these are contained within the same statute;[2] in Canada and Denmark they are required by the same policy decision; and in the Netherlands, SEA is mandatory under separate legal provisions (1994). In the European Union a proposed Directive is likely to apply to certain plans and programs soon.[3] Australia proposes to introduce legal requirements for SEA; a Bill presently being considered includes provisions for EA and biodiversity conservation, and it is possible that under this SEA may be applied to draft legislation (1998).

Sustainable development should guide all policy and decision-making, including legislative EA. This is because the interconnectedness of environment, economy and society is now well understood, if not fully acted upon. Legislative EA is a new way of assessing environmental, economic and social impacts at an early time in the legislative process. Although governments have been reluctant to open policy and decision-making processes to scrutiny, legislative EA in part overcomes this; it operates within existing contexts which in many countries already permit a certain amount of scrutiny. Applying basic EA procedures and methods is a useful starting point, and if supplemented by a greater understanding of the context in which legislative proposals are prepared and approved, legislative EA has significant potential to contribute to the advancement of sustainable development.

Provisions for legislative EA may therefore be identified within a complex set of EA and SEA requirements, which have not been comprehensively considered to date. Historically, each has been introduced with the

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2 In Finland the *Act on Environmental Assessment Procedure* 1994 contains the SEA requirement which includes legislative proposals. Guidance on legislative EA was released separately in 1998.

3 See von Seht, H, and Wood, C, 1998. 'The Proposed European Directive on Environmental Assessment: Evolution and Evaluation', 28/5 *Environmental Policy and Law*, pp 242-249.

objective of sustainable development, and each is based upon procedures and methods of EA. With SEA as the general area of study, this thesis examines the most established of these procedures within their given context.

1.2 Objectives and limitations

The primary objective of this thesis is to evaluate whether legislative EA contributes to sustainable development. In order to do this, the procedural effectiveness of legislative EA processes in Canada and the Netherlands will be analysed. By developing and applying criteria to legislative EA processes in Canada and the Netherlands, this research contributes to a greater understanding of the potential of legislative EA to further sustainable development.

Comparative research of this kind is necessary to see how practice in one's own country could be improved with reference to examples elsewhere. By evaluating existing Australian EA provisions and planned SEA provisions, conclusions reached at the end of this research will be of benefit to Australia in developing its own legislative EA provisions. It is necessary that contextual differences are fully appreciated however, because:

> Cross-national comparative research raises questions such as national culture, language, institutions of government and law, political divisions, and evolution of urban structure. These and other issues have to be confronted, and taken into account, in order to undertake comparative evaluation or make any realistic proposal for policy transfer.[4]

Legislative EA considers how environmental, economic and social aspects of sustainable development are combined in policy and decision-making. The legislative drafting stage formalises policy-making into a tangible procedure; the political processes that follow, (for approving bills and draft regulations), constitute the decision-making process. This thesis evaluates how well each component of sustainable development is integrated into policy-making; integration in the decision-making process is discussed where sufficient information and openness allows. For the most part confidentiality concerns prevent a fuller discussion of the decision-making

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4 Masser, I, and Williams, R (ed). 1986. *Learning From Other Countries: The Cross-National Dimension in Urban Policy-Making*, Geo Books: Norwich, in foreward, p. xiv.

process; however reference is made to it, (for example in examining decision criteria), when this is possible and appropriate.

This thesis evaluates procedural and contextual aspects of legislative EA. Procedural effectiveness considers how well EA is working with reference to compliance with the rules which guide it, and contrasts with substantive effectiveness, which examines compliance with reference to changes made to the environment as a result of its application. There has been very little research carried out into the substantive effectiveness of EA. Evaluating whether desired legislative outcomes have been reached requires isolating the impact of the legislation in producing that outcome. This requires a longer timeframe than research on this thesis permits.

Concentrating upon procedural effectiveness is appropriate given the recent, developing nature of the legislative EA procedures in the countries considered. It is also appropriate because of the emphasis given to this in the 1996 Reports of the International Study of the Effectiveness of Environmental Assessment. These are likely to have a significant influence on guiding future EA development.[5] Before substantive effectiveness can be evaluated, it is therefore necessary to evaluate the procedural dimension, as this plays a significant role in facilitating change.

However this thesis does consider certain changes which result from applying legislative EA procedures in appropriate contexts, and a greater understanding of these changes may be gained through legislative EA practice. These include the integration of environment, economy and society in policy formulation and decision-making; and improvements to a number of important procedures, such as the consideration of alternatives and opportunities for public participation. It is essential that these contexts are well understood if the legislative EA processes in Canada and the Netherlands are to have potential for transfer to Australia.

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5 Sadler, B, 1996. *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance*, Final Report, International Study of the Effectiveness of Environmental Assessment, International Association for Impact Assessment/Canadian Environmental Assessment Agency - the 'Final Report'; Sadler, B, and Verheem, R, 1996. *Strategic Environmental Assessment: Status, Challenges and Future Directions*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer - the 'SEA Report'.

1.3 Hypothesis and research questions

The hypothesis to be tested is that legislative EA furthers sustainable development. How it does this is the concern of this research, which may be expressed in seven questions; these are set out in Table 1.1 and discussed briefly below. The questions are framed in general terms as the thesis is a piece of exploratory, policy-based research. They underlie all of the chapters of this thesis, and the conclusions drawn at the end of each chapter are directed to answering them. The final chapter brings the conclusions together in such a way that they mirror the research questions outlined.

Table 1.1: Thesis Research Questions

1.	Does legislative EA contribute to the achievement of sustainable development, and if so, how does it do this?;
2.	Should EA procedures be applied to legislative EA, and if so, what are the most important of these?;
3.	Does the legislative process influence the assessment, and if so, does it include procedures which may be equivalent to EA procedures?;
4.	Should legislative EA be introduced by a policy rather than a legal requirement, and if so, why?;
5.	Is it possible to evaluate the implementation of legislative EA to see how well it is working, and if so, how may this be done?;
6.	How effective are the legislative EA processes in Canada and the Netherlands?; and
7.	How effective are Australia's proposed SEA provisions, and to what extent is Australia able to apply these to legislative EA?

1. Does legislative EA contribute to the achievement of sustainable development, and if so, how does it do this?

In order to answer the first part of this question, it is necessary to have an operational definition of both sustainable development and legislative EA. The first will be defined in Chapter 2, and the second in Chapter 3. In order to answer the second part, Chapter 4 will give an overview of systems of legislative EA worldwide, and Chapters 7 and 8 will evaluate legislative EA processes in Canada and the Netherlands. Conclusions drawn with respect to this question in Chapter 9 should therefore be specifically referenced to conclusions reached in these earlier chapters.

2. ***Should EA procedures be applied to legislative EA, and if so, what are the most important of these?***

EA procedures have developed extensively since the introduction of the first requirements in the United States in 1969. These have recently been applied to SEA procedures, and it is appropriate to examine to what extent they may be utilised in the development of legislative EA. Procedures will be discussed in Chapter 2, and examined for their inclusion in the principles and criteria developed in Chapters 5 and 6. To answer both parts of this question, the legislative EA evaluations in Chapters 7 and 8 should be specifically referred to, where key procedures will be identified.

3. ***Does the legislative process influence the assessment, and if so, does it include procedures which may be equivalent to EA procedures?***

It is preferable to utilise existing decision-making contexts in applying SEA. If these already include requirements which are equivalent to EA procedures, it may be unnecessary to duplicate them by introducing new provisions. The legislative process is the decision-making context within which legislative EA procedures are applied. In Chapters 7 and 8 the decision-making contexts underlying legislative EA procedures in Canada and the Netherlands will be examined, and it is to the conclusions reached here that the answers to these questions may be found.

4. ***Should legislative EA be introduced by a policy rather than a legal requirement, and if so, why?***

The need to decide on the form of implementation of legislative EA requirements is an important one. It has been a key question for decision-makers implementing EA and SEA requirements, and it will continue to be discussed with regard to each of these processes as well as legislative EA. While the advantages of certainty, transparency and access to the courts are commonly cited in favour of a legal basis, the advantages of flexibility, and the avoidance of delays and litigation are often mentioned in favour of a policy basis. Each of these issues will be discussed generally in Chapter 3, and specific consideration will be given to the form of implementation of the Canadian and Dutch legislative EA provisions in Chapters 7 and 8.

5. *Is it possible to evaluate the implementation of legislative EA to see how well it is working, and if so, how may this be done?*

Evaluation of EA processes is the general subject of this thesis, and it is appropriate that consideration should be given to the techniques used for the specific application of this. The use of procedural principles and criteria to evaluate EA and SEA will be examined in Chapters 5 and 6, and criteria will be developed there for evaluating the procedures and contexts of legislative EA. It is to these chapters that regard should be had in answering both of these questions.

6. *How effective are the legislative EA processes in Canada and the Netherlands?*

Following the development of procedural and contextual criteria in Chapter 6, the criteria will be applied to the legislative EA processes in both countries in Chapters 7 and 8. Effectiveness in this thesis is concerned with compliance with these criteria, and compliance with the provisions of the Canadian Cabinet Directive, and the Netherlands' Environmental Test. The procedural guidance available under each process will be examined with reference to twenty five criteria derived from the principles and criteria available to date; the contexts underlying each of the processes will also be evaluated to examine the influence they may have on the legislative EA processes.

7. *How effective are Australia's proposed SEA provisions, and to what extent is Australia able to apply these to legislative EA?*

The development of EA and SEA in Australia and the sustainable development context underlying them will be described and analysed in Chapters 2, 3 and 4. There has been much interest in SEA and effectiveness evaluation in Australia; many of the principles and criteria set out in Chapters 5 and 6 have been developed in Australia. Australian decision-makers are currently considering the introduction of new legislation for EA and SEA; some of the SEA provisions in the bill may also be applied to proposed legislation. By considering the three contexts set out in Chapter 6 in relation to these provisions, it is possible to draw conclusions in Chapter 9 as to whether Australia can introduce a legislative EA process of its own.

2. Methodology

The research design of this thesis comprises: a literature review, interviews and two case studies. Together these constitute the 'action plan' of this research; this is designed to answer the seven questions posed above, and has been expressed as follows:

> ...a research design is *an action plan for getting from here to there*, where *here* may be defined as the initial set of questions to be answered, and *there* is some set of conclusions (answers) about these questions. Between 'here' and 'there' may be found a number of major steps, including the collection and analysis of relevant data.[6]

The objective is to conduct a piece of exploratory, comparative research. A flexible approach to the collection and collation of material is essential because of the political sensitivities of the processes to be evaluated. It is also important that opinions are sought as widely as possible, to avoid unnecessarily restricting the scope of the inquiry. Given the wide-ranging nature of the material to be obtained, as comprehensive an approach as possible is also necessary.

2.1 Literature review

An extensive literature search, review, synthesis and analysis will be used to identify legislative EA procedures, EA evaluation methods, and further information on the six particular legislative proposals chosen for evaluation. Canada and the Netherlands will be examined in detail as no independent research has been carried out on legislative EA in either, and the close links between each country permits opportunities for comparative analysis.[7] In both countries the documentary review will consider both primary and secondary source materials.[8]

Four legislative proposals in Canada will be evaluated: the *Western Grain Transportation Act* (WGTA), the proposed *Canadian Endangered Species Protection Act* (CESPA), the *Pulp and Paper Regulations* (PPRs), and the

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6 Yin, R, 1994. *Case Study Research: Design and Methods*, Sage Publications: Thousand Oaks, p 19.

7 These include the drafting of a *Memorandum of Understanding* between Environment Canada and the Dutch Ministry of Housing Spatial Planning and the Environment, (May 1988), and the bilateral workshops held on EA and SEA development in Montebello (1989) and Noordwijk (1992). Each country has provided strong support for the International Study into the Effectiveness of EA.

8 The former included the Directive and E-test, guidance and review documentation; draft principal and subordinate legislation in the Statutes of Canada and Canada Gazette, and proposals identified by the Draft Legislation Working Group, together with their associated impact statements. The latter included the literature on Canadian and Dutch SEA, and the literature concerning its underlying legal/administrative, social/political and environmental/economic contexts.

Yukon Timber Regulations (YTRs). Two legislative proposals in the Netherlands will be evaluated: the *Decree governing the Disposal of Electrical and Electronic Appliances* (DEEA), and the *Administrative Order on Combustion Plants* (AOCP). The examples are part of a growing record of legislative EA implementation worldwide, and evaluating their compliance is an indication of the challenges that lie ahead.

2.2 Interviews

There are several different forms of interviews, with structured and semi-structured interviews the most common. Structured interviews are similar to questionnaires; a formal list of topics is prepared in advance and gone through with the respondent in sequence. Semi-structured interviews permit greater flexibility; although a set of questions is prepared in advance, there is scope to modify the order during the course of the conversation. To understand procedures and contexts, these can be used to solicit both general and specific information from practitioners and academics. This is the approach taken in this thesis, and includes an informal Delphi survey with recognised experts in the field.[9]

Another reason for using semi-structured interviews is to strike a balance between formality and informality in terms of appearance and conduct. It is necessary to establish a relationship of substance and a sense of connection; it is important to make the respondent feel comfortable and reassured that, if necessary, any information obtained will be treated in confidence.[10] General questions will begin any interview, and more detailed matters will be introduced shortly afterwards. The time constraints of those interviewed will be borne in mind at all times, together with an appreciation for the help offered by the respondent.

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9 In Canada, academics included Peter Boothroyd, George Hoberg, Peter Nemetz and William Stanbury (University of British Columbia), Bob Gibson (University of Victoria and University of Waterloo), and Barry Sadler (Institute of the North American West and Institute for Environmental Assessment). Practitioners included Jennifer Howell (CEAA), Paula Caldwell (Environment Canada), Brian Glabb (Treasury Board Secretariat), Martin Green (Privy Council Office), Brian Emmett (Commissioner of the Environment and Sustainable Development), and Jacques Leduc (Office of the Auditor General). In the Netherlands, the author has found no academic interest in the E-test to date. Practitioners interviewed included Yvonne de Vries (MINEZ), Esseline Schieven (MINEZ), Rob Verheem (EIA Commission), and Jan Jaap de Boer (VROM).

10 McCracken, G, 1988. *The Long Interview,* Sage Publications: London.

2.3 Case studies

The case study is defined as: 'a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real life context using multiple sources of evidence'.[11] It is recognised as the best approach to comparative, exploratory evaluations, especially where procedures and contexts are so closely linked that the boundaries of any study may be unclear.[12] Case study research is extremely flexible, and the use of multiple case studies makes any evidence obtained more compelling. Qualitative research is particularly well suited to this approach, because it is concerned with process, and because of its exploratory nature:

> One of the chief reasons for conducting a qualitative study is that the study is exploratory; not much has been written about the topic... being studied, and the researcher seeks to listen to informants and to build a picture based upon their ideas.[13]

Case studies will be carried out on the legislative EA processes of Canada and the Netherlands, although because of the secrecy of each process it will not be possible to directly observe the influence of the assessment on decision-making. The social/political context of democratic government, the environmental/economic context of sustainable development, and the legal/administrative context of legislative drafting and approval will all be analysed for their general influence on the process.

Criteria will be used to evaluate the effectiveness of legislative EA in Canada and the Netherlands. These have been applied to EA processes for a number of years, and they have increasingly been applied to SEA processes also. They are a useful way of ascertaining whether a number of key procedural aspects are present in any process; the underlying purpose of using these is:

> ...to judge the effectiveness of any EIA system and to enable an international comparison to be made between EIA systems. Such a comparative review provides the basis for suggesting how the effectiveness of EIA can be improved, a goal which is attracting considerable interest.[14]

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11 Creswell, J, 1994. *Research Design: Qualitative and Quantitative Approaches*, Sage Publications: Thousand Oaks, p 52

12 Yin, op cit n 6.

13 Creswell, op cit n 11 p 21.

14 Wood, C, 1995. *Environmental Impact Assessment: A Comparative Review*, Longman: Harlow, p 11.

The Canadian Directive has been chosen for evaluation for the following reasons: with the exception of the United States *National Environmental Policy Act 1969* (NEPA), its legislative EA requirements have been in force the longest, and there had been significant experience with them; no independent evaluation has been carried out of its operation to date; it was introduced with the objective of sustainable development; and finally, there are clear opportunities for Australia to benefit from Canada's experience, as the contexts of each country have much in common.

The Netherlands E-test has been chosen for the following reasons: it is one of the more recent of the legislative EA provisions, and it has been introduced by a country that has a strong record in EA and environmental performance; no independent evaluation has been carried out of its operation to date; it was introduced with the objective of sustainable development; it links with the Business Effects Test (BET), which appears to strengthen moves for integration; and finally, it illustrates a different approach to legislative EA in a unitary, civil law jurisdiction, which is of relevance to a number of other countries in Europe.

At the time of writing, there has been little academic interest in either the Canadian Directive or Dutch E-test; the Implementation Review carried out by the Canadian Environmental Assessment Agency (CEAA),[15] and the poorly publicised government sponsored evaluations of the E-test remain the only studies to date to evaluate compliance.[16] To supplement these, the two case studies will be carried out to evaluate the compliance of the legislative proposals with the Directive, E-test and criteria developed.

As mentioned in the reference at the commencement of this chapter, legislation which has the objective of environmental improvement should also be assessed. Selecting legislation on this basis is in accord with the guidance issued on the Canadian Directive and is in contrast with approaches taken elsewhere where non-environmental protection

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15 The Federal Environmental Assessment Review Office (FEARO) was replaced by the Canadian Environmental Assessment Agency (CEAA) when the Canadian *Environmental Assessment Act* came into force in 1995 - see sections 61-74 which contain the transitional provisions.

16 Canadian Environmental Assessment Agency, 1996. *Review of the Implementation of the EA Process for Policy and Program Proposals*, CEAA. This considered general compliance with the Blue Book procedures; there has been no discussion of this in either the academic literature or at the last two Annual Conferences of the International Association for Impact Assessment in New Orleans or Christchurch. This contrasts strongly with the presentation of research findings into both the Danish and Dutch processes which are ironically more recent.

legislation was chosen.[17] Although legislative EA should be applied to all proposals with potential to significantly impact upon the environment, it was felt that if adverse impacts were likely from proposals with the objective of environmental protection, then effectiveness was in doubt.

Time constraints will not permit the opportunity to follow the legal/administrative passage of any of the examples, (most of the regulations are already in force at the commencement of this research), nor the substantive impact of the legislation upon the environment.[18] Evaluation will therefore be retrospective, following adoption of each set of regulations, passage of the decree and administrative order, and abandonment of the bills.[19]

The Canadian examples have been chosen because they include both principal and subordinate legislation, both of which are assessed under the Directive. In the Netherlands the more recent introduction of the E-test, (and more limited application to date), meant there was less choice; the distinction between principal and subordinate legislation is not important in the Netherlands – the E-Test applies to all national proposals if certain conditions are satisfied. Both the DEEA and the AOCP are good examples of this.

In general, two reasons guided the choice of evaluating the legislative proposals in each country: each was to have the likelihood of significant environmental impact, and each was to have generated some degree of controversy. In Canada, a legislative review was carried out of all principal and subordinate legislation in force or pending since the Directive's

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17 Elling, B, and Nielson, J, 1996. *Environmental Assessment of Bills - Phase 1*, Centre for EA, Department of Environment, Technology and Social Studies, Roskilde University Centre: Roskilde, p 24.

18 This has been attempted recently with little success; see Davey, L. 1997. *The Use of Strategic Environmental Assessment in the Development of Legislation - A Framework for Nova Scotia, Canada*, unpublished MES thesis, Dalhousie University: Halifax, p 97. Although Davey accepts that a number of constraints made this difficult, and is committed to the need for substantive effectiveness to be given greater emphasis (see Chapter 7, section 1.3 of this thesis), she comments that 'the results of the case study revealed a frustrating inability to demonstrate clear linkages between the implementation of legislation and resulting environmental impacts.' This has also largely been the experience of Wathern et al in their study of the impacts of the Less Favoured Areas Directive in the UK, where they comment upon 'the lack of predictive capability', and the difficulty of 'detecting policy effects after implementation'. See Wathern, P, Young, S, Brown, I, and Roberts, D, 1987. 'Assessing the Impacts of Policy: A Framework and an Application', 14 *Landscape and Urban Planning* pp 321-330.

19 There is a clear need for research along the lines of that carried out in Denmark, whereby the passage of a legislative proposal may be followed to see how it accords with the SEA provision, and more importantly, how the environment is improved as a result of the proposal. Given differences of application, a high degree of political will by all concerned would be required.

introduction in 1990.[20] A brief screening process was applied to each, with consideration given to the objective of the proposal and the criticism generated by it in the literature. As a result of this and subsequent discussions, the WGTA, CESPA the PPRs and YTRs were identified for evaluation.[21] In the Netherlands, the small body of literature on legislative EA was examined, and the DEEA and the AOCP were chosen because, in addition to the likelihood of significant impact and potential for controversy, the most detailed information was available on them.

The WGTA was chosen because of the interest it had already generated in the existing SEA literature. The assessment process applied to it had been commended, and because it was not specified as an example of legislative EA, further examination was appropriate. The proposed CESPA was selected as an example of a current statute to which the Directive was applied. The PPRs were chosen as their effectiveness had been questioned by the Auditor General of Canada. The YTRs were chosen as they illustrated the tendency to cite positive impacts but ignore negative ones. The DEAA was chosen because it illustrated the need for a coordinated response in the assessment process. The AOCP was chosen because of the important guiding role of the 'help desk' in the assessment.

The evaluations of each will demonstrate compliance with the Directive and E-test procedures, and compliance with the procedural criteria which will be developed in Chapter 6. They will also highlight the role that the parliamentary process plays in the assessment; in Canada, the differences between the administrative context under which the regulations were prepared, and the legal context under which the statute was prepared is of particular significance here, as it is similar to the law-making process in Australia.

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20 The Statutes of Canada and Canada Gazette (and associated impact statements) were the primary souce materials used for this purpose.

21 Discussions with Professor Les Lavkulich, Institute for Resources and Environment, University of British Columbia regarding likely Canadian proposals helped to confirm the choice; there was far less choice regarding the Dutch proposals.

3. Presentation

3.1 Definitions and terminology

The literature relating to this thesis is well known for the complexity of definitions and terminology, and for the multitude of acronyms used; many other words and phrases will be abbreviated in this thesis. Already in this chapter EA, SEA, PPPs, WGTA, CESPA, PPRs, YTRs, DEAA and AOCP have been used. These are the most commonly employed acronyms, and each are either stated in full and/or defined at the first available opportunity. For the benefit of those not familiar with the material however, where any confusion arises reference should be made to the list of acronyms and abbreviations set out at the beginning of the thesis.

3.2 Content and structure

This thesis is in three parts: applying SEA to legislative proposals, (Chapters 3 and 4); using criteria to evaluate procedures and contexts, (Chapters 5 and 6); and evaluating legislative EA in Canada and the Netherlands, (Chapters 7 and 8). Chapter 2 will consider the objective and background for legislative EA: sustainable development and EA respectively. This enables a brief historical overview to be given, together with a consideration of Australian developments to date.

In Chapter 3, SEA and legislative EA will be described and analysed; consideration will be given to their purpose, rationale, evolution, scope and difficulties. Chapter 4 will consider the systems of legislative EA that exist in the USA, the European Union, Denmark, Norway and Finland; an overview will be given of legislative EA systems in Canada and the Netherlands; and the proposed SEA requirements in Australia will be discussed.

In Chapter 5, the process of evaluation will be examined; attention will be given to its purpose and rationale, the importance of context, and the use of principles and criteria. Chapter 6 will examine the procedural principles for EA and SEA that have developed; a comparison will be made of each set of criteria, and suggested criteria will be developed and outlined for evaluating the procedural and contextual basis of legislative EA.

Chapters 7 and 8 will consider in detail the contexts and procedures of legislative EA in the Netherlands and Canada. After each system has been described, the criteria developed in the previous chapter will be applied to the 6 legislative proposals chosen to evaluate compliance. Conclusions will be drawn in Chapter 9 which will answer the 7 research questions set out in earlier in this chapter.

3.3 Summary

This research is a comparative examination of each of the known jurisdictions with legislative EA requirements, with particular attention given to Canada and the Netherlands. It is also an examination of evaluation methods, in particular of the use of criteria to assess the effectiveness of legislative EA. It draws conclusions which are of specific relevance to Australia, and which are of general application elsewhere.

Chapter 2 - Sustainable Development and Environmental Assessment

Introduction

The purpose of this chapter is to describe sustainable development and EA and explore the links between each. Sustainable development is the objective of all environmental policy-making, and EA is a valuable tool for achieving that objective. An international historical overview is given of both, together with a description and analysis of their application in Australia. This sets the framework for the thesis, as sustainable development is the objective of legislative EA and legislative EA is based on the same procedures as project level EA.

The historical overview of sustainable development begins with a discussion of the emphasis given to integrating environment, economy and society in the international conferences and commissions held in Stockholm, Rio and elsewhere. Key principles are outlined, and different approaches are considered. The importance of policy coordination through the use of strategies, reports and institutions is then analysed, and suggestions are made for improving existing practice.

Australian experience with sustainable development is outlined with reference to the National Strategy for Ecologically Sustainable Development, the State of the Environment Report and the Intergovernmental Agreement on the Environment. The impact of the Strategy and Report are considered briefly, and the role of the Agreement in furthering sustainable development in Australia is reviewed.

The historical overview of EA begins with a consideration of the influence of the *National Environmental Policy Act* 1969 in the US, traces the development of EA provisions elsewhere, defines EA and discusses terminology, outlines key procedures, and finally examines the links between EA and sustainable development. Australian experience with EA from the *Environmental Protection (Impact of Proposals) Act* 1974 to the new *Environment Protection and Biodiversity Conservation Bill* 1998 is then analysed.

1. Sustainable Development

Sustainable development is the objective of legislative EA. The purpose of this section is first to introduce the concept by examining the definitions, principles, and approaches that have been taken to it to date; and second, to consider the practical measures that have been taken to its implementation. An international overview is followed by an analysis of Australian perspective's and practice.

1.1 Historical overview

a. Integration of environment, economy and society

'Sustainable development' is the integration of environment, economy and society in policy and decision-making. Interest in the concept is largely the product of three major international conferences and commissions, and declarations and reports released thereafter: the United Nations Conference on the Human Environment (UNCHE 1972, the *Stockholm Declaration*[1]); the World Commission on Environment and Development (WCED 1983, the *Brundtland Report*[2]); and the United Nations Conference on Environment and Development (UNCED 1992, the *Rio Declaration,* and *Agenda 21*[3]); and the International Union for the Conservation of Nature (IUCN 1980, 1990 and 1991, the *World Conservation Strategy, Caring for the World* and *Caring for the Earth: A Strategy for Sustainable Living*[4]). The former states that sustainable development:

> ...must take account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long-term as well as the short term advantages and disadvantages of alternative actions.[5]

Sustainable development is based upon seven principles: the public trust doctrine, where there is a duty on the state to hold the environment in trust for the benefit of the public; the precautionary principle, which requires

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1 United Nations Conference on the Human Environment, 1973. *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972, UN Doc. A/CONF. 48/14/Rev 1: New York.

2 World Commission on Environment and Development, 1987. *Our Common Future*, Oxford University Press: Oxford, p 8.

3 See Grubb, M, 1995. *The Earth Summit Agreements: A Guide and Assessment*, Earthscan: London.

4 International Union for the Conservation of Nature, 1991. *Caring for the Earth: A Strategy for Sustainable Living*, IUCN: London.

5 International Union for the Conservation of Nature, 1980. *World Conservation Strategy*, IUCN: Gland.

caution where scientific certainty is lacking; the principles of inter- and intra-generational equity, where environmental resources are to be used in a way that all people benefit equally from them, (whether between or within generations); the subsidiarity principle, which emphasises decision-making by the communities most closely affected; and the polluter and user pays principles, which require the true cost of the use of environmental resources to be paid for, whether by the polluter or user.

The link between environment, economy and society is particularly important, and two approaches may be distinguished: anthropocentric and ecocentric. The first sees the environment primarily in terms of how it may be utilised for human purposes (economic sustainability). The most common approach, it comprises a number of positions, some of which reject economic individualism and emphasise social, creative and spiritual aspects. It may be contrasted with the second, where the environment is believed to have intrinsic value of its own (ecological sustainability). Both are central to differences in interpretation, with tensions between each.[6]

> From an anthropocentric perspective, the most fundamental thing to be sustained is the general 'ecological capital' that maintains and enriches human life... an ecocentric perspective, in contrast, is concerned to widen further the class of beings whose interests are taken into account in human decision-making. The most fundamental thing to be sustained is not just humankind but rather nature writ large.[7]

Proponents of economic sustainability must consider environmental consequences as a result of the Second Law of Thermodynamics (the 'Entropy Law'). The more modern concepts of 'carrying/assimilative capacity' or 'environmental thresholds' illustrate what is meant by this; these are related in turn to the concepts of 'ecological footprints'[8] and 'environmental space'[9]. Each is used to demonstrate that the resources consumed by a given community such as a city are far greater than the area occupied by that community, and are therefore unlikely to be ecologically sustainable:

> For human society, regional carrying capacity can be defined as the maximum rate of resource consumption and waste discharge that can be

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6 Boer, B, 1991. 'Sustainable Development and the Business Community: The Challenge of the 1990's' 18 *Australian Construction Law Newsletter*, pp 25-32.

7 Eckersley, R, 1991. 'The Concept of Sustainable Development' in Behrens, J, and Tsamenyi, M, (ed), *Our Common Future*, Faculty of Law: Hobart, p 49.

8 Rees, W, 1992. 'Ecological footprints and appropriated carrying capacity - what urban economics leaves out' 4(2) *Journal of Environment and Urbanization*, pp 121-30.

9 Friends of the Earth Netherlands, 1996. *Sustainable Netherlands Revised*: Amsterdam.

sustained indefinitely in a defined planned region without progressively impairing bioproductivity and ecological integrity.[10]

b. Coordination through strategies, reports and institutions

If the 1980 IUCN *World Conservation Strategy* is credited with having '...introduced the concept of sustainable development,'[11] and the 1983 WCED *Brundtland Report* gave substance to it, then *Agenda 21,* the 1992 UNCED 'Action Plan' released following the 'Rio Earth Summit', '...serves as the most extensive guidebook to sustainable development ever prepared.'[12] It sets out a number of practical measures, including 'that governments should adopt a national strategy for sustainable development.'[13]

Chapter 10 is an important section in Agenda 21, recommending that parties '[a]dopt strategic frameworks that allow the integration of both developmental and environmental goals,'[14] and that '[governments... should] systematically apply techniques and procedures for assessing the environmental, social and economic impacts, risks, costs and benefits of specific actions.'[15] These emphasise the importance of procedural guidance in establishing an overall framework of both environmental and developmental goals and integrating environmental aspects through the use of assessment tools, such as legislative EA.

The intention of Rio was that proposals for sustainable development would be received by the newly established Commission on Sustainable Development (CSD) from all countries; guidelines for good practice would be set, and performance monitored. Many (including Australia), have now taken on board the Earth Summit recommendations, with a large number of national sustainable development strategies (NSDSs) and state of the environment reports (SoERs) produced.[16]

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10 Rees, W, 1988. 'A Role for Environmental Assessment in Achieving Sustainable Development' 8 *Environmental Impact Assessment Review*, p 288.

11 Koester, V, 1990. 'From Stockholm to Brundtland' 20/1/2 *Environmental Policy and Law*, pp 14-19.

12 Grubb, op cit n 3, p 157.

13 Parargraph 8.7.

14 Paragraph 10.7(b)

15 Paragraph 10.8(b)

16 The Earth Summit was revisited in 1997, as 'RIO +5', this enabled an evaluation to be carried out of progress to date.

NSDSs set the framework and focus debate on sustainable development, and most can best be incorporated into existing plans. Above all, it is important they relate government policies with one another, and monitor and report upon them subsequently. In doing so, NSDSs should identify any policies which may override others, and the circumstances in which this may happen.

Strategies can provide an overview of key issues, help overcome problems of organisation/policy fragmentation, link government with other groups in society, and help develop management skills. A multisectoral approach to the strategies is advantageous, as it allows links to be drawn between each sector. There are of course difficulties, which include conflicting definitions of sustainable development, inadequate participation and ineffectual political will. The most important is probably the latter, the lack of which may be exacerbated when changes of government occur during the lifetime of a strategy.

Above all, NSDSs are an essential practical method of guiding sustainable development initiatives at all levels, as the framework of objectives they set integrate environment, economy and society in a comprehensive guiding document. Strategies take many forms: some focus on environmental concerns and their incorporation into the development process, some deal with economic and social issues, and others emphasise particular sectors or themes. However although a number of useful documents have been produced to date, it is probably true to say that there is:

> ...no example of a fully integrated strategy; one that combines all aspects of social, economic and environmental policy into a sustainable development strategy, as called for by Agenda 21 and Caring for the Earth. The trend is clearly in this direction, however. Sustainable development strategies have the potential to replace the development planning process as we know it today.[17]

The need to report subsequently upon the success or failure of policies set out in NSDSs has been acknowledged.[18] As with any policy

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17 Carew-Reid, J, Prescott-Allen, R, Bass, S, and Dalal-Clayton, B, 1994. *Strategies for National Sustainable Development: A Handbook for their Implementation*, International Union for the Conservation of Nature/International Institute for Environment and Development/Earthscan: London, p 40. See also Johnson, H, (ed), 1995. *Green Plans: Greenprint for Sustainability,* University of Nebraska Press: Lincoln.

18 Waight, S, 1995. *State of the Environment Reporting in Australia,* unpublished masters thesis, University of Tasmania: Hobart. See also Lloyd, B, 1996. 'State of the Environment Reporting in Australia: A Review', 3(3) *Australian Journal of Environmental Management,* pp 151-162.

statement, there must be monitoring mechanisms in place to evaluate compliance, otherwise the policies themselves are likely to be questioned. Such reports must be open and accessible, to both the public and their political representatives.

SoERs have been utilised to some extent for this purpose, although there has been a tendency for them to emphasise statistical changes without indicating underlying reasons. Attributing environmental change to policy-making is both difficult and controversial for those involved, however it is of central importance in evaluating performance. A failure to accept this ensures that future policy-making (and future development of NSDSs, which should be a cyclical process), may well be based upon profound inaccuracies.

Finally, the *Brundtland Report* called for the development of new institutions to ensure that environmental considerations are as central to all decisions as economic ones.[19] Government measures could include the creation of an environment section within each government department, which if composed of policy-makers from the environment department, would ensure that closer links are drawn between it and the host department; they could also include the release of guidelines from a central government department such as prime minister and cabinet or treasury, which would ensure that environmental issues assume greater prominence.

Other measures could include strengthening the environmental focus of the committee system, to ensure that legislative proposals are considered for their impact upon the environment as well as the economy; and establishing an independent office to review executive action, which would bring greater accountability. However as with other reforms, '...sustainable development is not a fixed state of harmony, but a process of change... [and] in the final analysis, sustainable development must rest on political will.'[20]

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19 Op cit n 2, pp 311-313.

20 Ibid, p 9.

1.2 Sustainable development in Australia

a. National strategy for ecologically sustainable development

The approach of the Australian federal government (the Commonwealth) to NSDSs began with the production of *A National Conservation Strategy for Australia* (NCSA) in 1984.[21] In this, development was defined in accord with the IUCN *World Conservation Strategy*, which emphasised integration within an anthropocentric perspective. The Commonwealth believed obtaining consensus on a definition was necessary to generate support from all sides,[22] and the concept was therefore left deliberately vague.[23] This was instrumental to its broad acceptance:

> Development is... the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life. For development to be sustainable it must take account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long term as well as the short term advantages and disadvantages of alternative actions.[24]

In 1990 a Discussion Paper was released by the Commonwealth which defined 'ecologically sustainable development' (ESD) as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.'[25] The addition of the 'E' in ESD was designed to emphasise that the carrying capacity of the environment was above all else to be maintained, with ESD defined as follows:[26]

> There are two main features which distinguish an ecologically sustainable approach to development: (i) we need to consider, in an integrated way, the wider economic, social and environmental implications of our decisions and actions for Australia, the international community and the biosphere; and (ii)

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21 Commonwealth of Australia, 1984. *A National Conservation Strategy for Australia*, AGPS: Canberra, p3.

22 For an overview of the Australian perspective, see Beder, S, 1993. *The Nature of Sustainable Development*, Scribe publications: Newham.

23 No relative weighting was given to each aspect for example, see Palmer, D, 1992. *Methods for Analysing Development and Conservation Issues: The Resource Assessment Commission's Experience*, RAC Research Paper no.7, AGPS: Canberra, p 13.

24 Section 1.3, p 12.

25 Commonwealth of Australia, 1990. *Ecologically Sustainable Development: A Commonwealth Discussion Paper*, AGPS: Canberra, p 6.

26 For consideration of the final and sectoral ESD reports and EIA, see Harvey, N, 1992. 'The Relationship Between Ecologically Sustainable Development and Environmental Impact Assessment in Australia: A Critique of Recent National Reports' 9(4) *Environmental and Planning Law Journal*, pp 265-273.

> we need to take a long term rather than short term view when taking those decisions and actions.[27]

Following the release of the Discussion Paper, nine sectoral working groups were established to consider the effect of the strategy on areas of Australia's economy that had major impacts on the environment.[28] In November 1991 reports were produced by each, and additional reports dealt with intersectoral matters and the greenhouse issue. Although these provide the foundation on which the eventual NSESD was drafted, they have been criticised for a lack of opportunities for community input.[29]

Coordination and integration were to be crucial to the effectiveness of the strategy, and the preparation and recommendations of the 1992 Earth Summit provided further international impetus. In 1992, Australia's National Strategy for Ecologically Sustainable Development (NSESD) was released.[30] Although largely instrumental in achieving equilibrium between economic and ecological sustainability, as with the NCSA a number of criticisms were forthcoming.[31] Above all, it was questioned whether the balance between conservation and development or environment and economy was ever really achieved, as Endre comments:

> The result is a definition of sustainable development that has the appearance of cross-referencing different philosophical and cultural values ... by placing different and competing normative positions on equal footing... These competing values fail to provide a functional environmental strategy.[32]

The reason for this is that the integration of environment and economy should have the objective of achieving net gains for both. Unfortunately this is rarely the intention of most governments, including Australia. Instead, trade-offs are frequently permitted, particularly in the environmental sphere. While the logic of such trade-offs must be

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27 Commonwealth of Australia, 1992. *National Strategy for Ecologically Sustainable Development*, AGPS: Canberra, p 6.

28 Agriculture, energy production, energy use, fisheries, forest use, manufacturing, mining, tourism and transport.

29 Willis, I, 1992. 'The Ecologically Sustainable Development Process: An Interim Assessment' Spring *Policy*, pp 8-12.

30 Op cit n 27.

31 Gill, P, 1990. 'Sustaining Debate on the Economics of Conservation' 10 *Australian Construction Law Newsletter*, pp 23-25; Rigney, S, 1991. "'Between a Rock and a Hard Place': The Imposition of a National Strategy of Sustainable Development with Resource Security" 7 *Queensland University of Technology Law Journal*, pp 97-101, Tyrril, J, 1990. 'Ecologically Sustainable Development, A Commonwealth Discussion Paper' 13 *Australian Construction Law Newsletter*, p 26.

32 Endre, H, 'Legal Regulation of Sustainable Development in Australia: Politics, Economics or Ethics', 32 *Natural Resources Journal*, p 490.

questioned where there is a limited resource base, the definition of integration in this thesis accepts the political realities of sustainability, which are usually guided by the economic sector. Such realities must be seen as transitory to a position where net gains for both sectors becomes the accepted practice.

Many of the States have strategies of their own, some of which are required by law.[33] In New South Wales for example, the Environment Protection Authority is required to protect, restore and enhance the quality of the environment having regard to the need to maintain ESD, and this requires the effective integration of economic and environmental considerations in the decision-making process.[34]

b. State of the environment reporting

In 1992, a discussion paper was released by the Commonwealth which invited comment on the establishment of a SoER system in Australia.[35] A State of the Environment Advisory Council was established to coordinate the process and ensure the production of a report, which was released in 1996.[36] Although dominated by statistical trends in Australia's environmental condition since European settlement, it makes a number of references to the link between policy-making and environmental outcomes. It also comments upon the inadequate coordination of environment, economy and society, and the lack of emphasis given to the environment in economic planning:

> Overall, economic planning appears to take little account of environmental impacts. It is assumed that the first priority should be a healthy economy, and that problems can always be solved using the wealth created. The economy is a subset of human society which, in turn, is part of the environment. Progress towards sustainability requires recognition of this fundamental truth, and a willingness to build environmental thinking into our economic planning.[37]

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33 See for example the production of: State Environmental Planning Policies under the *Environmental Planning and Assessment Act* 1979 (NSW), State Environmental Protection Policies under the *Environment Effects Act* 1978 (Vic), State Sustainable Development Policies under the *State Policies and Projects Act* 1993 (Tas), Environment Protection Policies under the *Environmental Protection Act* 1986 (WA), Environmental Protection Policies under the *Environmental Protection Act* 1994 (Qld), the State Planning Strategy under the *Development Act* 1993 (SA), and the Territory Plan under *Land (Planning and Environment) Act* 1993 (ACT).

34 See *Protection of the Environment Administration Act* 1991.

35 Commonwealth Environment Protection Agency, 1992. *Development of a National State of the Environment Reporting System*, CEPA: Canberra.

36 Commonwealth of Australia, 1996. *Australia: State of the Environment*, CSIRO.

37 From 'Conclusions' in Executive Summary.

Examples of policy failures cited in the report include management of biodiversity and coastal resources. Despite having a National Strategy for the Conservation of Australia's Biodiversity, this is dependent upon community-based action for successful implementation, and a lack of comprehensive federal biodiversity legislation inhibits further action.[38] Management of coastal resources is also fragmented, and despite improvements in data collection and institutional provision, (such as the State of the Marine Environment Report and establishment of the Great Barrier Reef Marine Park Authority), an integrated, coordinated framework built on eco-system goals and performance indicators is needed.

Management of natural heritage is another area of concern, and cuts in Commonwealth expenditure in the 1998 budget, together with inadequate responses to threatened sites serve only to increase this.[39] The report stresses the need for indicators to be developed, and that without these it will not be possible to evaluate the state of Australia's heritage resources. Finally, although there is a legislative basis for protection, this is relatively easy to undermine if the political will to enforce it is lacking.

SoERs have also been released by the State Government's, some in accord with legal requirements. In Tasmania for example, the Resource Planning and Development Commission (the successor of the Sustainable Development Advisory Council) must prepare a SoER every five years. There is also provision for the policy link to be drawn between the success or otherwise of any Sustainable Development Policies declared.[40]

c. Intergovernmental agreement on the environment

Negotiation of the Intergovernmental Agreement on the Environment (IGAE) was '...instrumental in gaining consensus from all Australian Governments on the need for a more nationally consistent and improved approach to numerous environmental issues...'[41] The links with the

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38 The *Environment Protection and Biodiversity Conservation Bill* 1998 is the major part of the Commonwealth environmental law reform proposal considered at the end of this chapter.

39 The budget allocation for World Heritage in 1998/99 has been halved, and the heritage values of Kakadu are threatened with further uranium development at Jabiluka following the decision of the Northern Territory Government to grant approval prior to the release of the EIS. This remains the case, despite the decision of UNESCO at the end of 1998 to defer the 'Heritage in Danger' designation for Kakadu that remains a possibility.

40 *State Policies and Projects Act* 1993, section 29(1)(c) and (d).

41 Environment Protection Agency, 1994. *Public Review of the Commonwealth Environmental Impact Assessment Process* - Discussion Paper, Commonwealth of Australia, para 14.

NSESD are close, as the IGAE recognises '...that the concept of ESD including proper resource accounting provides potential for the integration of environmental and economic considerations in decision-making, and for balancing the interests of current and future generations.'[42]

ESD is therefore stated to lie behind '...the adoption of sound environmental practices and procedures,[43] and four broad concepts entitled 'Principles of Environmental Policy' are outlined which are designed to promote it.[44] These are: the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms. The last of these recognises that economic instruments may be a useful way of encouraging more environmentally responsible behaviour.[45]

The IGAE provides for coordination of the respective roles of the Commonwealth, States, Territories and Local Government. The Commonwealth is given the responsibility for '...facilitating the cooperative development of national environmental standards and guidelines,'[46] and the States, Territories and Local Government in turn have interests and responsibilities to participate in the development of these. Bates comments on this potential constitutional role:

> The IGAE represents a desire on the part of the Commonwealth and State Governments in particular to move away from the confrontationalist politics which characterised the approach to major environmental issues in the 1980s towards a more co-operative approach based on agreed principles and standards.[47]

Schedule 3 of the IGAE deals with EA specifically, and there are a number of references to the assessment of policies, plans and programs (PPPs) as well as individual projects. This is discussed in the next section, following an overview of EA and other Australian EA developments, which indeed appear to bring about a reduction in the Commonwealth's environment responsibilities.

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42 Commonwealth of Australia, 1992. *Intergovernmental Agreement on the Environment*, p 2.

43 Ibid, s 3.2.

44 Ibid, s 3.

45 Bates, G, 1995. *Environmental Law in Australia*, Butterworths: Sydney, pp 32-35

46 Op cit n 42, s 2.2.1(iii).

47 Bates, op cit n 45, p 97. See also Gardner, A, 1994. 'Federal Intergovernmental Co-operation on Environmental Management: A Comparison of Developments in Australia and Canada' 11 *Environmental and Planning Law Journal*, pp 104-137, and Mossop, D, 1992. 'Lost in the Jungle of Federalism' 3 *Polemic*, pp 139-141.

2. Environmental assessment

The practice of environmental assessment (EA) forms the basis for legislative EA, which applies EA specifically to legislative proposals. The purpose of this section is to examine the development of EA since its introduction 30 years ago in the United States (US). Particular emphasis is given to the links between EA and sustainable development; after presenting an international overview, Australian practice is analysed.

2.1 Historical overview

a. National Environmental Policy Act 1969 (US)

In the US and worldwide, the *National Environmental Policy Act 1969*[48] (NEPA) was the driving force behind the development of EA, and applied both to PPPs and individual projects. However NEPA was as much about good environmental planning and management as a set of procedural requirements for the assessment of proposals. The significance of the title of the Act is frequently overlooked, and the preamble in section 2 contains an early indirect reference to sustainable development, with the intention 'to declare a national policy which will encourage productive and enjoyable harmony between man and his environment'.[49]

Under section 204(3) of NEPA the CEQ is required to review and appraise PPPs with reference to the national environmental policy, and prepare an Environmental Quality Report as a result; these are clearly early requirements for the preparation of both NSDSs and SoERs. Resolving inter-agency disagreements is also an important role of the CEQ, together with considering the effectiveness of NEPA.[50]

The most recognised aspect of NEPA is however the 'action-forcing' mechanism of the Environmental Impact Statement (EIS, or Environmental Statement - ES), and much of the EA procedure has developed from this. Caldwell stresses the importance of the

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48 *National Environmental Policy Act* 1969.

49 This has recently been restated by NEPA's creator, in Caldwell, L, 1998. 'Beyond NEPA: Future Significance of the National Environmental Policy Act', 22 *Harvard Environmental Law Review*, pp 203-239.

50 US Council on Environmental Quality, 1997. *The National Environmental Policy Act - A Study of its Effectiveness after Twenty-Five Years*, Executive Office of the President: Washington DC. For a brief commentary on this, see Smythe, R, 1997. (editorial), 'CEQ Releases NEPA Effectiveness Study', 2(4) *NEPA News* pp 1-3.

precautionary principle in NEPA's development, and the consideration of alternatives in procedure. He comments that the purpose of EA was 'to broaden and strengthen the role of foresight in government planning and decision-making,'[51] and '...it should not be forgotten that EIA... is foremost an informing and testing of policy alternatives, and this is its role in NEPA or, at least, its intended role'.[52]

b. EA worldwide

Since the introduction of NEPA, the spread of EA globally has been dramatic, and requirements were soon introduced in a number of developed nations. These include: Canada (1973), Australia and New Zealand (1974), France, Germany and Ireland (1976), and the Netherlands (1987). Although other nations such as Columbia and Thailand introduced early requirements (1974), most developing and underdeveloped nations were slower in adopting EA.[53] Such a change often came in response to conditions attached to aid or loans provided by international development and funding bodies.

These bodies often recommended EA, or had requirements of their own. They include the Organisation for Economic Cooperation and Development (OECD). In 1974 this suggested that member nations adopt EA, and in 1992 suggested they make it conditional on granting aid.[54] In 1988 the United Nations Environment Programme (UNEP) issued guidance on EA in developing countries,[55] and in 1989 the World Bank ruled that EA should be undertaken in borrower countries, preparing guidance in 1991.[56]

Although developing and underdeveloped nations are the focus of these groups, in 1987 and 1996 the UNEP also made recommendations to

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51 Ibid, p 7.

52 Caldwell, L, 1989. 'Understanding Impact Analysis: Technical Process, Administrative Reform, Policy Principle' in Bartlett, R, (ed), *Policy Through Impact Assessment*, Greenwood: New York, pp 13-14.

53 Biswas, A and Agarwala, S (ed), 1992. *Environmental Impact Assessment for Developing Countries*, Butterworth-Heinmann: Oxford; Htun, N, 1994. 'The EIA process in Asia and the Pacific region', in Wathern, P, (ed), *Environmental Impact Assessment: Theory and Practice*, Routledge: London, pp 225-238; Moreira, I, 1994. 'EIA in Latin America', in Wathern, P, (ed), *Environmental Impact Assessment: Theory and Practice*, Routledge: London, pp 239-253.

54 Organisation for Economic Cooperation and Development, 1992. *Good Practices for Environmental Impact Assessment of Development Projects*, OECD Development Assistance Committee: Paris.

55 United Nations Environment Program, 1988. *Environmental Impact Assessment: Basic Procedures for Developing Countries*, UNEP Regional Office for Asia and the Pacific: Bangkok.

56 World Bank, 1991. *Environmental Assessment Sourcebook*, World Bank: Washington DC.

developed nations regarding EA, including the need for SEA.[57] Many of the above requirements therefore include SEA also, or have since been supplemented by SEA requirements.

c. Definition and terminology

EA has been subject to a good deal of interpretation since NEPA. Although there is no general and universally accepted definition, the following includes many important aspects:

> ...environmental impact assessment (EIA) is taken to mean the systematic examination of the likely environmental consequences of proposed projects, programmes, plans and policies. The results of the assessment - which are assembled in a document known as an environmental impact statement (EIS) - are intended to provide decision-makers with a balanced appraisal of the environmental, social, and health implications of alternative courses of action. When an EIS has been prepared, it is used by decision-makers as a contribution to the information base upon which a decision is made. In this way, EIA can assist in formation and evaluation of environmentally sound development proposals.[58]

Given the links between sustainable development and EA today, 'economic' could have been added to the list of implications to be appraised, and the final sentence substituted with '[i]n this way, EA can contribute towards sustainable development'. The reference to PPPs in addition to projects encompasses SEA, which has grown in influence in the last ten years. Application to PPPs contributes to sustainable development as assessing impacts at the highest level is based upon the precautionary principle; this may avoid the need for later assessment of specific proposals.

EA is also known as 'environmental impact assessment', 'environmental impact analysis' and 'environmental effects assessment'; with the terms 'assessment', 'analysis' and 'appraisal' used interchangeably; the same is also true of the terms 'impact' and 'effect'. 'Environmental' is increasingly used to include the social and economic environments as well as the ecological, and 'integrated EA' is often used to describe such assessments, which are becoming increasingly common. Caldwell

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57 In 1987, Goals and Principles were set out by the UNEP. These are duplicated in Gilpin, A, 1995. *Environmental Impact Assessment: Cutting Edge for the Twenty-First Century*, Cambridge University Press: Melbourne, pp 83-84. More recently the UNEP has engaged a consultancy to provide an update on best practice. See Scott Wilson Resource Consultants, *Environmental Impact Assessment: Issues, Trends and Practice*, United Nations Environment Programme: Nairobi.

58 Clark, B, 1984. 'Environmental Impact Assessment (EIA): Scope and Objectives' in Clark, B, Gilad, A, Bisset, R, and Tomlinson, P, (ed), *Perspectives on Environmental Impact Assessment*, Reidel: Dordrecht, pp 5-6.

believes the distinction between ecological, social and economic impacts is unnecessary as '[a]ll impacts are in some sense environmental. The idea of interactive relationships is implicit in the term 'environment.'[59]

d. Procedure

Since the introduction of EA following NEPA, a number of key procedural aspects have received attention in the development of EA elsewhere. Seven aspects are described briefly below: screening, scoping, reporting, reviewing, decision-making, monitoring, and system monitoring.[60] Many of the principles discussed in Chapter 6 are based upon these aspects, and understanding how they operate is necessary for the discussion of SEA and legislative EA in Chapters 3 and 4.[61]

Screening is concerned with what proposals should be assessed. Although it may include both PPPs and projects, its function is to narrow application to proposals which are likely to impact significantly upon the environment. The notion of 'significance' has been present since NEPA's inception, with a 'discretionary approach' taken based upon the opinion of the assessing authority (often the proponent). Criticisms regarding the lack of certainty and transparency have ensured that an alternative, 'list approach', has become accepted by many as a more effective way to ensure compliance. This answers these criticisms by listing both types of activity and environment, and impacts which are likely to derive from one or impact upon the other must be assessed. At the policy level, impacts may more appropriately be 'listed' by reference to the sectors from which those impacts are likely, for instance transport or energy.

Scoping determines the issues to be addressed in the assessment and the content of the documentation to be produced. This should include consideration of need, alternatives and mitigation measures. The public must be involved in the process if it is to have credibility, with the

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59 Op cit n 52, p 7.

60 Devuyst believes that the development of EA procedure may be seen in three distinct phases: the 1970's marked by 'high hopes and experimentation', the 1980's by 'realism, expansion and new procedural steps' and the 1990's by the 'establishment of new procedural steps and legislation', together with 'unresolved problems'. Although report production was present in the 1970's, screening, scoping and monitoring were not introduced until the 1980's, and opportunities for participation together with SEA procedures'the 1990's. Review and system monitoring have also been more recent, of which the Netherlands has been in the forefront of development. See Devyust, D, 1994. *Instruments for the Evaluation of EIA*, PhD thesis, Vrije Universiteit: Brussels.

61 EA methodology is limited to a discussion of principles and criteria for evaluation in Chapters 5 and 6.

importance of wide consultation and participation recognised. Involving the public in the production of scoping guidelines is an important part of this, as the matters set out there are to be included in the documentation subsequently produced.

The need for reporting cannot be overstated, and the EIS is commonly required to be prepared by the proposer of the PPP or project. This will set out within it the likely impacts upon the environment. This information must be in accord with any legislative or policy requirements, and any scoping guidelines developed beforehand.

The purpose of reviewing an EIS is to see if it meets the requirements laid down in law or policy, or in any scoping guidelines. In order for this to be effective, it must be both independent and public. Independence is most likely through the use of an independent EA commission,[62] and there may be opportunities for public participation in this or in other processes to which EA is applied, such as the legislative process where committees may actively seek the views of interested persons. However review more often takes place in the Environment Department, and if the proponent is a public body there may be concerns regarding government bias.

The EIS plays a significant part in decision-making, as the information contained within it together with recommendations made in the review process are designed to influence the decision-maker. As a result, approval may either be granted or not, and if it is may be subject to a number of conditions requiring impacts to be mitigated.

Monitoring considers how accurate and adequate the information provided in the EIS has been following implementation. It is designed to check for adherence with mitigation conditions attached to any approval and whether impact predictions were valid. Monitoring has been neglected more than any other stage in the process, and clearly there is little point in proceeding through a complicated process of assessment if once a proposal is approved there are no continuing checks.[63] Although the assessing authority may be involved in this, an alternative is to use an independent parliamentary commissioner or auditor. If accessible to the public and given wide powers to monitor effectiveness and require

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62 See Mostert, E, 1995. *Commissions for EIA*, Delft University Press: Delft.

63 See Glasson, J, Therivel, R, and Chadwick, A (1994) *Introduction to Environmental Impact Assessment: Principles and Procedures, Process, Practice and Prospects*, UCL Press, London, p 181.

cessation of a proposal if it is not being implemented satisfactorily, better environmental outcomes are likely to result.

System monitoring is a way in which an independent and public ongoing appraisal may be conducted of the EA system. It is designed to check to see if it is functioning effectively and, if not, make any changes that are necessary. It is important to monitor a system regularly and periodically, as otherwise problems may develop which are not rectified until too late.

e. EA and sustainable development

EA can be an important environmental policy tool for advancing sustainable development, particularly for the opportunities for integration that come from its use. Many of the principles of sustainable development considered in section 1.1a above are also applicable to EA, such as the precautionary principle, public involvement, and government guidance. It is possible for these principles to be operationalised in the development of criteria which can be used to evaluate whether decisions are sustainable or not (see Chapter 5, section 3.4).

Most recently, 'Sustainability Assurance' (or assessment/analysis) has been suggested as a way of ensuring that EA takes a more proactive stance. This is discussed in Chapter 3 together with SEA, cumulative EA, (which considers how in combination individual proposals may have greater impact than the sum of each of those proposals added together), and integrated EA (which links the assessment of environmental, economic and social impacts); each have much to recommend them in advancing sustainable development.

A number of suggestions have been made at the international level for using EA to advance sustainable development. In 1972 the UNCHE's *Action Plan for the Human Environment* emphasised that environment, economy and society should be incorporated into planning processes, which no doubt include EA.[64] In 1990, the United Nations Economic Commission for Europe (UNECE) *Convention on Environmental Impact*

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64 This is also known as the Global Environment Assessment Programme, or Earthwatch; see Recommendation 102 ILM Vol 11, p 1460-1461.

Assessment in a Transboundary Context[65] stressed the need to use EA to deal with cross border impacts to ensure sustainable development.

In 1992 the *Rio Declaration* of the WCED stated that 'EIA as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.'[66] However social impacts are overlooked here, as Grubb comments: 'Principle 17 urges the use of EIA, which is useful but falls short of best practice, and does not move towards improved environmental assessment which should incorporate social and participatory concerns.'[67] If integration is to be achieved, it is therefore important that social considerations play an important role, including provision for participation. This is because of the principle of subsidiarity (see section 1.1a above), and because without the involvement of people affected by any proposal, its implementation is unlikely to be accepted by them.

2.2 EA in Australia

a. Environment Protection (Impact of Proposals) Act 1974

The *Environment Protection (Impact of Proposals) Act* 1974 (EP(IP) Act) was modelled to a large extent upon NEPA, and like NEPA applies EA to both projects and PPPs. This was as a result of the way 'proposal' was defined, and the Commonwealth's original intentions.[68] Although the matters listed in section 5 (a)-(e) of the EP(IP) Act do not appear to provide much scope for the application of the process to strategic levels, the general object is framed in broad terms. This is 'to ensure, to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account' in the making of Commonwealth government decisions. Although it is arguable

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65 United Nations Economic Commission for Europe, 1991. *Convention on Environmental Impact Assessment in a Transboundary Context*, 30 ILM 800.

66 Op cit n 3, p 93; see also Johnson, S, 1993. *The Earth Summit*, Graham and Trotman: London.

67 Op cit n 3, p.112.

68 For early consideration see Fowler, R, 1982. *Environmental Impact Assessment, Planning and Pollution Measures in Australia*, AGPS: Canberra, and Formby, J, 1987. 'The Australian Government's Experience with EIA' 3 *Environmental Impact Assessment Review*, pp 207-226.

that the broadness of the wording already includes SEA provision, amendment would, in any event, be relatively straightforward.[69]

In contrast with NEPA, the EP(IP) Act allows far greater discretion to federal proponents, there are opportunities for preparing different types of EIS, and there is a power to hold inquiries. Because of concerns about the costly delays of litigation, the Commonwealth introduced discretionary assessment requirements in an attempt to make the process immune from judicial review. The EP(IP) Act provided the framework for other EA developments in the States and Territories, although many have updated requirements since.

Research on EISs prepared between 1974 and the end of 1991 indicates that there has been very little application of the EP(IP) Act to PPPs, with only two early inquiries dealing with policy matters, as supplemented by one since.[70] While recommendations had been made in relation to a small number of programs, these were without formal EISs.[71] The conclusion drawn is that '[i]n practice, the degree of discretion provided by the Act and the reluctance of politicians and administrators to extend EIA to non project actions has restricted its coverage almost entirely to projects.'[72]

Despite limited application, interest in SEA in Australia has been strong. This has been generated by: the Australian and New Zealand Environment and Conservation Council (ANZECC), during the preparation of its *National Agreement on Environmental Impact Assessment*; the Commonwealth Environment Protection Agency (CEPA), in conducting a *Public Review of the Commonwealth Environmental Impact Assessment Process*; and, most recently Environment Australia, (the Department of Environmental Protection within this is CEPA's successor), in the release

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69 See Court, J and Associates Pty Ltd and Guthrie Consulting, 1995. *Assessment of Cumulative Impacts and Strategic Assessment in EIA*, Commonwealth of Australia p 6.18.

70 See Department of the Arts, Sport, the Environment, and Territories, 1992. *List of Proposals on which Environmental Impact Statements* have been directed under the *Administrative Procedures - Commonwealth Environmental Protection (Impact of Proposals) Act 1974*, DASET: Canberra. For updated list, see http://www.environment.gov.au/portfolio/epg/eianet/eia/assessments.html

71 These included the assessment of Commonwealth funded highway construction programs, and applications to the overseas aid programme.

72 Wood, C, 1992. 'Strategic environmental assessment in Australia and New Zealand' 7 *Project Appraisal*, pp 143-149.

of a *Consultation Paper* which includes the EP(IP) Act in proposed wide-ranging environmental law reform.[73]

b. The National Agreement on Environmental Impact Assessment

The objectives of EA and its connections with sustainable development were reported on by ANZECC in 1991.[74] The *National Approach to Environmental Impact Assessment in Australia* and accompanying *Background Paper*[75] were centred around 34 principles which were designed to provide the structure for reforms to the EP (IP) Act.[76] The National Approach promotes the need to recognise connections between EA and ESD, and states that '[i]n providing a philosophical foundation for public policy, the goals of ecologically sustainable development become a framework for the EIA process.'[77] Section 4 sets out some of the main connections, which have been subject to some criticism:[78]

- the use of resources by present generations is achieved while protecting the interests of future generations...
- protection of biodiversity and ecosystem integrity
- provision of net community benefits from proposals that are implemented
- social equity, for example through public participation in the decision making process
- reflection of full environmental costs of proposals in decisions on resource use
- caution in dealing with environmental risk and irreversibility.[79]

Section 6.1 of the National Approach contains an explicit recommendation for SEA; entitled 'Application of the Principles of EIA to Projects, Programmes, Plans and Policies'. This states:

> The application of the principles of EIA to policies, plans and programmes is becoming increasingly important to set a framework for project evaluation; to expedite the process and make outcomes more predictable; and to increase

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73 To these developments may be added the role of the Resource Assessment Commission (RAC) in conducting federal inquiries into issues of major policy significance, the application of the Western Australian legislation to SEA, and the use of the Cabinet mechanism in requiring ESD to be considered in the formulation of government policy. Comment will be made upon these in Chapter 4.

74 Australian and New Zealand Environment and Conservation Council, 1991. *A National Approach to Environmental Impact Assessment in Australia*, ANZECC: Canberra, p 4.

75 Australian and New Zealand Environment and Conservation Council, 1991. *A National Approach to Environmental Impact Assessment in Australia*, Background Paper of the Working Group, ANZECC: Canberra, p 8.

76 These principles are discussed in Chapter 6.

77 Op cit n 75, p 1.

78 Harvey believes the opportunity to identify stronger linkages has not been taken. op cit n 26, p 270.

79 Op cit n 75, p 4. The relationship between EA and ESD is expanded upon in the Background Paper, p 8.

the degree of planning certainty for proponents and the community - regardless of whether or not the EIA process itself is applied.[80]

The IGAE provides for the incorporation of the principles and objectives of sustainable development into the EA process,[81] and schedule 3 provides for EA specifically. Schedule 3(1) states that certainty, consistency and the avoidance of duplication are to be prime objectives in a national approach to EA, and schedule 3(2) that EA should be integrated and include 'environmental, cultural, economic, social, and health factors. Schedule 3(3) sets out 12 principles to guide the EA process, and schedule 3(4) states that a framework agreement will be negotiated to ensure coordination, providing for the accreditation of EA processes between Australian governments.[82] This became the *National Agreement on Environmental Impact Assessment*,[83] and together with the National Approach and IGAE, also includes provision for SEA.

The NSESD was designed to incorporate ESD into the EA process, and chapter 15 deals with EA specifically. Some 70 of the recommendations relate directly or indirectly to EA, with many referring to the need for SEA.[84] Chapter 15.1 states that the concern is '[t]o ensure the guiding principles of ESD are incorporated into EIA...' and chapter 15.2 '[t]o increase the sensitivity of the EIA process, its planning and policy context and consequent decision making to cumulative and regional impacts.'

c. Public review of the Commonwealth EA process

In November 1993 CEPA released an initial discussion paper entitled *Setting the Direction*,[85] and appointed consultancies to consider particular aspects of the process. In November 1994 this was followed by the release of the final discussion paper, *Public Review of the Commonwealth*

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80 Op cit n 75, p 9.

81 The principles in 3(3) are discussed in Chapter 6.

82 For further detail on accreditation and its pitfalls, see Fowler, R, 1996. 'Environmental Impact Assessment: What Role for the Commonwealth? - An Overview' 12 *Environmental and Planning Law Journal*, pp 246-259.

83 Australian and New Zealand Environment and Conservation Council, 1992. *Basis for a National Agreement on Environmental Impact Assessment*, ANZECC: Canberra, The draft National Agreement was endorsed by the ANZECC Ministers and is presently in the process of consideration by State and Territory Ministers with EIA responsibilities. The final Agreement is expected to be released shortly.

84 See objectives 15 and 16, and chapters 12, 13, 15, 18, and 19, which discuss SEA and its relationship to planning and pollution control. Note also that the NSESD sectoral Working Group Reports also recommend SEA although they have been criticised for a lack of coordination by Harvey, op cit n 26, p 267

85 Commonwealth of Australia, 1993. *Setting the Direction*, AGPS: Canberra.

Environmental Impact Assessment Process,[86] and a consultation paper, *Assessment of Cumulative Impacts and Strategic Assessment in Environmental Impact Assessment.*[87] Both have been major contributors to the development of EA and SEA in Australia, with consideration given to an enhanced legislative role for each.

The intention was to improve environmental protection by emphasising the effectiveness and efficiency of the EA process. Consultations were to be undertaken with interested parties, and other developments at the Commonwealth level drawn upon, such as the NSESD, the IGAE, and the National Agreement. Although the EP(IP) Act represented a significant advance in environmental protection in 1974, it had remained relatively unchanged since. There was therefore a need to consider improvements to practice based on the experience of other countries.

A number of options were set out to improve the existing process, and in particular comments were sought upon: the objectives of EA, the appropriate role for the Commonwealth, the issues to be examined by the review, and the principles that should guide the development of an effective and efficient EA system. Ninety three submissions were received and all were supportive of the need for the review:

> ...the majority of respondents believed that the appropriate objective for EIA was the protection of the environment through supporting the application of the principles of ESD to government decision making.[88]

Part III entitled 'Future Directions' emphasised the limitations of EA and the importance of SEA:

> It is becoming increasingly apparent that project assessment alone, however good the process, cannot wholly produce effective and efficient environmental protection through environmental impact assessment. For example, project assessment cannot deal effectively with the environmental consequences of government policies, plans and programs... Increasingly, governments will need to focus on more strategic environmental assessment to ensure that all environmental impacts are examined as efficiently as possible.[89]

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86 Commonwealth Environment Protection Agency, 1994. *Public Review of the Commonwealth EIA Process*: Main Discussion Paper, Commonwealth of Australia.

87 Op cit n 69.

88 Op cit n 86, p 6.

89 Op cit n 86, para 234.

d. Reform of Commonwealth environment legislation

In November 1997, the Council of Australian Governments (COAG) gave in-principle endorsement to an *Agreement on Commonwealth/State Roles and Responsibilities for the Environment*, in accord with the IGAE. This emphasised that the Commonwealth's role should be focused upon matters of national environmental significance, and that the Commonwealth should rely upon state processes wherever possible ('accreditation').

The intention of the Commonwealth reforms was to implement this agreement and 'deliver better environmental outcomes in a manner that promotes certainty for all stakeholders, reduces intergovernmental duplication and minimises delay.'[90] The proposed reforms deal with the replacement of the EP(IP) Act by a new *Environment Protection Act,* and replacement of the *National Parks and Wildlife Conservation Act* 1975 by a new *Biodiversity Conservation Act*; the proposals were subsequently released as the *Environment Protection and Biodiversity Conservation Bill* 1998. Heritage legislation is also to be reformed, and enforcement and compliance given greater attention.

A significant problem with the EP(IP) Act has been the need to rely upon screening triggers which are unrelated to environmental criteria; this has resulted in delays, uncertainty and duplication. Above all, the reforms are aimed at recognising and implementing the principles of ESD, by ensuring it is the objective of the proposed reforms.[91]

The proposed *Environment Protection Act* therefore includes a list approach to screening (see section 2.1d), with the following triggers to activate the EA requirement: World Heritage properties, wetlands of international importance, heritage places of national significance, nationally endangered or vulnerable species and endangered ecological communities, migratory species and cetaceans, nuclear activities, and management and protection of the marine and coastal environment. By limiting significance to these key areas, the uncertainty of a broader definition is avoided. The Commonwealth's EA process would also

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90 Hill, R, 1998. 'Reform of Commonwealth Environment Legislation', *Letter Enclosed with Consultation Paper.*

91 This is already part of the *Natural Heritage Trust of Australia Act* 1997.

continue to apply to Commonwealth places and matters for which the Commonwealth has sole jurisdiction.

The proposed Act is intended to enable consideration of cumulative, regional and strategic impacts. SEA is provided for in section 2.3.6 of the consultation paper, the purpose being to provide an incentive for proponents to incorporate environmental considerations at the earliest possible stage in proposal planning. PPPs would be triggered by the same matters as projects; however it is not clear whether assessments would be required in such cases or whether the proponent or Minister would have to either seek a strategic assessment or direct that it take place.[92]

If an SEA is to take place, any matters examined as part of it would not be required to be re-examined at a later date. This is called 'tiering', and is one of the principal advantages of SEA for it reduces duplication of time and effort. The proposed Act provides that the Environment Minister would make a declaration to this effect, although conditions would have to be met, such as amendment to the PPP prior to its introduction.

Although there is a lack of detail in the consultation paper the proposal adopts many of the changes proposed by the 1994 Public Review, with provision made for reform of the triggering mechanism, ESD objectives and SEA. One of the most important implications is the redefinition of the Commonwealth's environment role. As a result of accreditation this may be reduced, and 'the legislative acceptance of a clearly defined and unique role for the Commonwealth brings to an end the era when the Commonwealth saw its environmental responsibilities as merely incidental to its other powers and activities.'[93]

The proposed Act has now been released as the *Environment Protection and Biodiversity Conservation Bill* 1998. This formalises the government's intentions set out in the consultation paper. There is scope for much more, including specific application to legislative proposals. Inclusion of SEA and legislative EA in future legislation is to be recommended for the potential advantages of certainty and transparency that may result; whether and how the proposal will be enacted and implemented, remains to be seen.

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92 Commonwealth Minister for the Environment, 1998. Hill, R, *Reform of Commonwealth Environment Legislation: Consulation Paper*, AGPS: Canberra, p 16.

93 Munchenberg; S, 1998. 'Commonwealth Environment Legislation Review - a Small Revolution', 15(2) *Environmental and Planning Law Journal*, p 77

Conclusions

The principal conclusion of this Chapter is that to advance sustainable development, the emphasis upon integrating environment, economy and society must be maintained in developing existing and new policy tools (section 1.1a). The focus in EA on integrating impacts and assessing them at strategic levels demonstrates its potential to further sustainable development, and legislative EA is a tool that does both of these things. Chapter 3 outlines how it does this, in the context of an examination of SEA.

The secondary conclusion is that Australia is well placed to introduce a system of SEA which could effectively provide for the assessment of impacts from proposed legislation. An appropriate policy context for sustainable development is now present with the establishment of a national strategy, a state of the environment report and other institutional provisions (section 1.2). Reform of existing EA legislation organised upon key principles of ESD has occurred at the same time, and new provisions may provide scope for the use of legislative EA (section 2.2).

There remains a need for greater monitoring of policy outcomes, so that reports may comment effectively upon existing strategies, recommending changes where necessary. The need to monitor outcomes is a persistent criticism made in this thesis; it is based largely upon government failure to emphasise the importance of outcomes (section 2.1d). While concerns are expressed regarding the economic costs of policy measures, these need to be paralleled by concerns for the environmental and social costs. Legislative EA is recommended as a way of doing this, as it can integrate assessment at an early time.

A greater understanding of the links between sustainable development and EA internationally and in Australia is therefore helpful in giving future direction to the Commonwealth reform process, and this thesis is a contribution towards this. Through an examination of SEA and evaluation methods, and an analysis of practice in Canada and the Netherlands, comparisons will be made and conclusions will be drawn with reference to Australia. Chapter 3 describes SEA and legislative EA, and includes examples of informal application of both in Australia.

PART 1:

APPLYING SEA TO LEGISLATIVE PROPOSALS

Chapter 3 - Strategic Environmental Assessment

Introduction

The purpose of this chapter is to consider how Strategic Environmental Assessment (SEA) and legislative EA can contribute towards sustainable development. The purpose and rationale of SEA and legislative EA is outlined, a historical overview is given, applications are described, and the difficulties raised in the literature are discussed.

Definitions of SEA and legislative EA are set out to illustrate the relationship between each, and the common objectives and principles that underlie both. The two main advantages of SEA and legislative EA are analysed; these are the potential to contribute to sustainable development, and the opportunity to improve EA.

The links between EA and land use planning, and policy analysis and legislative proposals are considered to emphasise the importance of context. SEA has developed from EA and land use planning through the use of the public inquiry and programmatic, class, areawide and regional assessments. Legislative EA has developed from policy analysis, through the use of integrated EA, regulatory reform and various ad hoc processes.

The application of SEA to policies, plans and programs (PPPs) and legislative proposals illustrates the range of potential proposals that may be assessed for environmental impact. Both proposed and existing PPPs and environmental and non-environmental PPPs are considered, and the use of legislative proposals to implement PPPs and projects by different types of legislative proposal is examined.

The potential difficulties of SEA and legislative EA are finally discussed to determine whether they may prevent the successful implementation of SEA and legislative EA. These include: matters of procedure and methodology; timing; introduction by law or policy; and issues of confidentiality, accountability and integration. These assist with providing background information on several of research questions raised in the problem statement.

1. Purpose and rationale

SEA is the application of EA to PPPs, and was coined as a term in 1989.[1] In the last ten years a substantial body of literature has developed in the SEA field,[2] and in the Final Report of the International Study of the Effectiveness of EA (the 'Final Report') SEA is cited as one of the 'new' dimensions of EA practice.[3] This section considers the purpose and rationale of SEA by examining: definitions and terminology, and objectives and principles. The latter are particularly important, and must be closely linked with resulting criteria if intended outcomes are to be evaluated successfully.

1.1 Definitions and terminology

SEA is known under a variety of terms, including policy assessment, policy impact assessment, policy EA, sectoral EA, programmatic EA, EA of PPP's and the integration of EA into policy making.[4] Most of the terms are similar, although sectoral EA considers impacts upon particular areas such as transport and energy, and programmatic EA considers programs rather than plans or policies. Many of the terms are used interchangeably, and although each is still used, there is a growing trend to use SEA for consistency.

Policies generally direct executive action and plans and programs deal with implementation.[5] However it is important to be aware that there is not always a clear distinction between PPPs, and what may be termed a

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1 By Christopher Wood of Manchester's EIA Centre. Note however the use of the term "Strategic Environmental Assessment System' by the US Environmental Protection Agency in the early 1980's. See Ratick, S and Lakshamanan, T, 'An Overview of the Strategic Environmental Assessment System' in Lakshamanan, T and Nijkamp, P (ed), 1983. *Systems and Models for Energy and Environmental Analysis*, Gower: Aldershot. This refers to the computer model originally developed by the US EPA to help decision makers anticipate environmental problems, and in particular to assess future pollution emissions.

2 Note Partidario, M, 1995. *Bibliography on Strategic Environmental Assessment*, Canadian Environmental Assessment Agency: Hull, which is now substantially out of date.

3 Sadler, B, 1996. *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance, Final Report*, International Study of the Effectiveness of Environmental Assessment International Association for Impact Assessment/Canadian Environmental Assessment Agency, - the 'Final Report'.

4 Partidario, M, 1996. 'Strategic Environmental Assessment: Key Issues Emerging From Recent Practice' 16 *Environmental Impact Assessment Review* p 33, and Therivel, R and Partidario, M, 1996. *The Practice of Strategic Environmental Assessment*, Earthscan: London, pp 4-5.

5 Bates, G, 1995. *Environmental Law in Australia*, Butterworths: Sydney, pp 115-116.

policy in one country may be termed a plan in another.[6] Policies are also as different from each other as they are from plans, programs and projects, and some may also include implementing measures such as legislative proposals. While in some cases policies may be well integrated, in others they are not.[7]

a. SEA

SEA helps overcome difficulties inherent in EA, and is increasingly seen as a tool to further sustainable development. As a result, there are two main approaches to SEA:

> The first literally extends practical knowledge with project EA and applies not only its principles but also the legal procedures and requirements...
>
> The second approach adopts a policy and planning rationale, whereby EA principles tend to be tailored in the formulation of policies... in the context of a vision for sustainable development.[8]

The first approach utilises EA theory and practice and applies it to the PPPs that underlie individual projects. By assessing the earliest PPP, later assessments avoid duplication of matters already assessed. This is known as 'tiering', with SEA assessing PPPs and EA projects.[9] With regard to the second approach, debate continues concerning the relationship of SEA with sustainable development.[10] While there is potential to reduce impacts by assessing the PPPs that underlie individual projects, some have argued that SEA goes further.

The need for integration therefore implies that SEA may consider both environmental, social and economic impacts of PPPs in a similar way that integrated EA assesses the environmental, social and economic impacts of projects at present.[11] Its relationship with cumulative EA may bring a focus on cumulative policy impacts to parallel the present interest in

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6 Wood, C, and Djeddour, M, 1992. 'Strategic Environmental Assessment: EA of Policies, Plans and Programmes' 10(1) *Impact Assessment Bulletin* p 6.

7 Sadler, B, and Verheem, R, 1996. *Strategic Environmental Assessment: Status, Challenges and Future Directions*, Netherlands Ministry of Housing, Spatial Planning and the Environment: Zoetermeer p 36.

8 Partidario 1996, op cit, n 4, p 37.

9 Lee, N, and Walsh, F, 1992. 'Strategic Environmental Assessment: An Overview' 7 *Project Appraisal*, pp 131-132.

10 Sadler and Verheem, op cit n 7, pp 35-36.

11 While integration may imply the link between environmental, social and economic aspects of project design, it is not necessarily limited to these, but may include PPPs also. For a recent view, see Bailey, P, 1997. 'IEA: A New Methodology for Environmental Policy', 17 *Environmental Impact Assessment Review* pp 221-226.

project ones.[12] Most significantly of all perhaps, interest in Sustainability Assurance may refocus impact assessment completely, as this is designed to ensure greater attention is given to the precautionary principle.[13]

It is therefore the application of EA to PPPs, together with the implications for sustainable development, that distinguishes SEA from EA. One or other of the approaches to SEA tend to be emphasised to the exclusion of the other, and although the trend appears to favour the second approach,[14] there is no reason why a combination of the two should not be possible.[15] While the importance of early consideration of environmental factors in policy formulation cannot be overstated,[16] it is quite possible to combine this with a formal procedure that retains the strengths of the 'action forcing' requirement of the EIS.

For this reason a third integrated approach may be suggested, which combines advantages of both. This would ensure that the precautionary principle underlies PPP development, and that a check is made upon the extent and success of compliance. The EIS therefore remains an extremely useful evaluation tool both for measuring and recording potential impacts, and indicating subsequent outcomes; in combination with environmental consideration at the earliest stage of PPP formulation, it can play an important role in contributing towards sustainable development.

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12 Beanlands, G, 1988. 'Comparison of Legal Systems for EIA in Canada, New Zealand and Australia' in *EIA as a Management Tool*, DASET: Canberra, p 72.

13 Sadler and Verheem, op cit n 7, pp 158-159.

14 While the United Nations Economic Commission for Europe Task Force proposed that SEA procedure should reflect as much as possible the principles of EA, the view of the International Summit on EA is not to do an EA of policy but rather to integrate environmental considerations in policy making - see Sadler and Verheem, op cit n 7, pp 105 and 26; more recently the European Commission has concurred with the latter view, stating that SEA at the policy level requires a 'fundamentally different approach' - Commission of the European Communities, 1997. *Case Studies on Strategic Environmental Assessment, Volume 1: Comparative Analysis of Case Study Findings, Conclusions and Recommendations*, DG XI, European Commission: Brussels. Examples are seen with Canada's 1990 *Cabinet Directive*, Denmark's 1993 *Administrative Order*, and The Netherland's 1995 *Environmental Test*. Canada and the Netherlands will be considered in Chapters 7 and 8.

15 There is in any event at present insufficient evidence to indicate which of the two approaches is more effective. Scott Wilson Resource Consultants, 1996. *Environmental Impact Assessment: Issues, Trends and Practice*, Environment and Economics Unit. United Nations Environment Programme: Nairobi, ss 45-46.

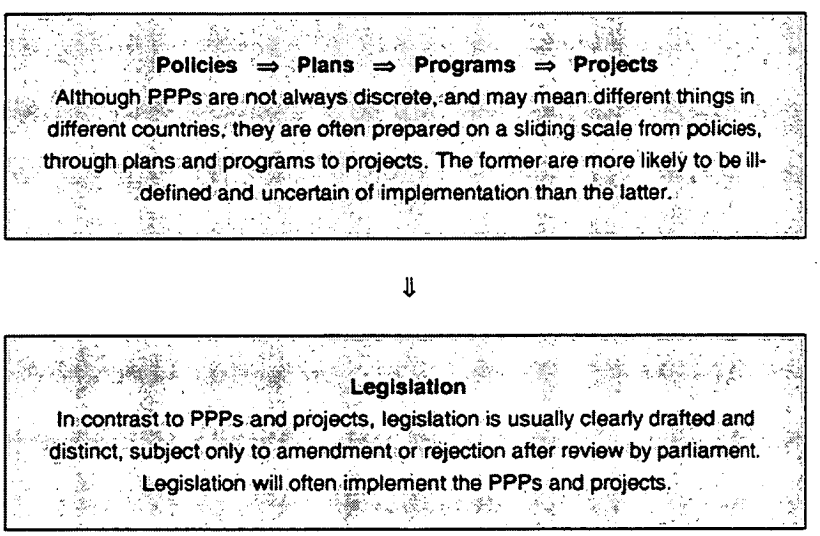
16 Research indicates that a majority of government agencies in Australia favour this, and that there is little support for applying EA processes. See Bailey, J, and Renton, S, 1997. 'Redesigning EIA to Fit the Future: SEA and the Policy Process', 15(4) *Impact Assessment*, pp 319-334.

In New Zealand the framework of the *Resource Management Act* 1991 (RMA) and the context of its operation enable an integrated approach to be taken. Although the formal preparation of an EIS is not required for the PPPs to be prepared, opportunities exist for checks to be made upon the extent to which integration is achieved. Both the Parliamentary Commissioner for the Environment (PCE) and the Minister of the Environment are able to give advice during and after policy formulation and implementation, the former in an independent capacity.[17]

b. Legislative EA

Legislative EA is closely linked with SEA. The application of both during different stages of proposal formulation is an important contribution to the tiering of assessment procedures discussed above. Figure 3.1 below sets out a simple diagrammatic illustration of the relationship between PPPs, projects and legislation.

Figure 3.1: Relationship between PPPs, projects and legislation



Legislative EA may be defined as a process for identifying the likely environmental consequences of legislative proposals, with the primary objective of minimising those consequences and contributing towards environmental protection and sustainable development. It does this by providing information and opportunities for participation, in order to assist

17 Gow, L, 1994. 'The New Zealand Experience in Policy Environmental Assessment', *Paper to the International Workshop on Policy Environmental Assessment*, The Hague, and Dixon, J, 1994. 'Strategic Environmental Assessment: The New Zealand Experience', *Paper to the International Association for Impact Assessment*, Quebec City.

with the decision-making process. The rationale for legislative EA is that it evaluates impacts at an important strategic time, integrates environmental, economic and social concerns, and coordinates and formalises existing approaches. All aspects of human behaviour are subject to change as a result of the draft legislation so assessed.[18]

All policies should undergo an initial screening process to ascertain the likelihood of significant impacts, as policies that may have the greatest environmental effects are those which do not deal with the environment directly.[19] Legislation offers one of the best opportunities to assess policy, as specific objectives and compliance dates help ensure greater certainty. Loosely formulated policies, in contrast, are more difficult to appraise.[20] Impacts are most likely once legislation is in place, and legislative EA therefore helps overcome some of the difficulties associated with the application of EA to PPPs, such as differences of opinion over what constitutes a PPP and the most appropriate time for assessment[21] (see Chapter 3, section 3.1, and section 4.2).

1.2 Objectives and principles

The main objective of SEA is environmental protection through the advancement of sustainable development. In order that this may be achieved, the principles of SEA need to be incorporated in policy formulation from the start. Other 'objectives for a system of SEA' are set out in Table 3.1 below. These are concerned with guiding SEA towards sustainable development, and may be translated into a number of principles which will be developed in Chapter 6.

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18 Op cit n 15, p 60.

19 See Bartlett, R, 1990. 'Comprehensive Environmental Decision Making: Can it Work?' in Vig, N, and Kraft, M, (ed) *Environmental Policy in the 1990's - Toward a New Agenda*, Congressional Quarterly Inc: Washington DC, p 248.

20 Wathern, P, Young, S, Brown, I, and Roberts, D, 1987. 'Assessing the Impacts of Policy: A Framework and an Application', 14 *Landscape and Urban Planning*, pp 321-330.

21 Lee and Walsh, op cit n 9, p 136; Wood and Djeddour, op cit n 6, and Therivel, R, Wilson, E, Thompson, S, Heaney, D, and Pritchard, D, 1994. *Strategic environmental assessment*, Earthscan: London, p 38.

Table 3.1: Objectives for a System of SEA (Therivel et al, 1994)

- to ensure the full consideration of alternative policy options, including the 'do-nothing' option, at an early time when an agency has greater flexibility;
- to enable consistency to be developed across different policy sectors, especially where trade-offs need to be made between objectives;
- to ensure that the cumulative, indirect or secondary impacts of diverse multiple activities are considered, including their unintended consequences;
- to enable adverse environmental impacts to be anticipated and hence avoided or prevented;
- to ensure that the environmental impact of policies that do not have an overt environmental dimension is assessed;
- to obviate the needless reassessment of issues and impacts at project level where such issues could more effectively be dealt with at a strategic level, and offer time and cost savings;
- to provide a publicly available and accountable decision-making framework;
- to ensure that environmental principles such as sustainability and the precautionary principle are integrated into the development, appraisal and selection of policy options;
- to give proper place to environmental considerations in decision-making vis-a-vis economic and social concerns, given that in some contexts they may be traded off against each other.[22]

Although a positive influence of SEA on the decision-making process is the most important of these, the use of the precautionary principle, integration of environment, economy and society and considering the potential environmental effects of all policies, are very important in ensuring sustainable development. Objectives that relate to documentation, procedure, significance, alternatives and public participation have also been highlighted in SEA systems elsewhere, and again these form the basis of many of the SEA 'procedural principles' that will be considered in Chapter 6.[23] Other important objectives are that SEA:

- Encourages the consideration of environmental objectives during policy, plan and programme making activities within non-environmental organisations.
- Facilitates consultations between authorities on, and enhances public involvement in, evaluation of environmental aspects of policy, plan and programme formulation...
- Facilitates consideration of long range and delayed impacts;
- Allows analysis of the impacts of policies which may not be implemented through projects.[24]

22 Therivel et al, op cit n 21, pp 35-36.

23 See Elling, B, 1997. 'Strategic environmental assessment of national policies: the Danish experience of a full concept assessment' 12(3) *Project Appraisal*, p 162.

24 Termed 'advantages' by Wood and Djeddour, op cit n 6, p 7.

Above all, flexibility is important for SEA objectives and principles to be met, in order to account for differences in context and application. The examples of land use planning and legislative proposals illustrate this, being the most popular SEA applications to date.[25] They have much in common, are based on long standing procedures, result in formal documentation and involve the public to a significant extent. However each also has very distinctive characteristics, and is subject to different processes in different countries; as a result it is important not to overgeneralise.

a. Contribution to sustainable development

SEA contributes to sustainable development in two main ways: integration of environmental, social and economic concerns in the SEA process, and, through the use of the precautionary principle, advancement of environmental protection in PPPs. SEA helps with integration due to the comprehensive and coordinated approach that should accompany its use, and it advances environmental protection if it is applied to all policies which subsequently filter down through plans and programs to projects.

There have been a number of references to the potential of SEA to contribute to sustainable development by international conferences and commissions. For example, the 1983 World Commission on Environment and Development (WCED) *Brundtland Report* comments that '[g]overnments must begin now to make the key national, economic and sectoral agencies directly responsible and accountable for ensuring that their policies, programmes and budgets support development that is economically and ecologically sustainable.'[26]

In 1990 the United Nations Economic Commission for Europe (UNECE) established a task force to consider the extent to which EA could be applied to PPPs. It looked at ten case studies of SEA in different countries, most of which related to small scale plans. In a follow up report, it commented on the relationship between SEA and sustainable development, recommending that:

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25 Note that the application to legislative proposals indicates that SEA is not as closely tied to the planning system as EA has traditionally been.

26 World Commission on Environment and Development, 1987. *Our Common Future*, Oxford University Press: Oxford, p 20.

> Priority should be accorded to the implementation of EIA through legislation which should... (promote) integrated environmental management in relation to sustainable economic development... EIA legislation should apply to individual projects and could allow for application to regional development schemes and programmes as well as general policies and strategies.[27]

In the same year, the United Nations Conference on Environment and Development (UNCED) agreed two conventions which contain provisions for SEA, the *Framework Convention on Climate Change*[28] and the *Biodiversity Convention.*[29] In the first, Article 4 sets out the need to take climate change considerations into account in relevant social, economic and environmental policies and actions. In the second, Article 14 requires the introduction of appropriate arrangements to ensure that the environmental consequences of its programs and policies are taken into account, if they are likely to have a significant adverse impact on biological diversity.

Integration of environmental, social and economic concerns in SEA and advancement of environmental protection in PPPs[30] are attained in part through the relationship between SEA and integrated EA, cumulative EA, and Sustainability Assurance. Each is strengthened by the important framework role played by sustainable development strategies (SDSs) and state of the environment reports (SoERs) which were considered in Chapter 2. Integrated EA, cumulative EA and Sustainability Assurance, together with the links between them, are described below.

Integrated EA has not generated anywhere near the body of literature or practice that cumulative EA has, and is open to greater interpretation.[31] Four main types of integration have been identified: integration of decision-making processes such as EA and land use planning; integration of tools such as SEA and cumulative EA; integration of EA and cost benefit analysis (CBA);[32] and (similarly), integration of environmental,

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27 United Nations Economic Commission for Europe, 1991. *Policies and Systems of Environmental Impact Assessment,* ECE/ENVWA/15 UN: New York.

28 Birnie, W, and Boyle, A, 1993. *International Law and the Environment,* Clarenden Press: Oxford, pp 483-486.

29 Ibid, p 486.

30 Therivel et al, op cit n 21, pp 123-132, and Therivel and Partidario, op cit n 4, pp 9-10.

31 Porter, A, and Rossini, F, 1983. *Integrated Impact Assessment,* Westview: Boulder; Bartlett, R, 1990. 'Comprehensive Environmental Decision-Making: Can it Work?' in Vig, N, and Kraft, M, (ed) *Environmental Policy in the 1990's: Toward a New Agenda,* Congressional Quarterly Inc: Washington DC; and Wathern, P, 1988. *Environmental Impact Assessment: Theory and Practice,* Routledge: London, pp 21-22.

32 See O'Riordan, T and Sewell, D (ed), 1981. *Project Appraisal and Policy Review,* Wiley: London pp 13-14; James, D, and Boer, B, 1988. *Application of Economic Techniques in EIA,* Macquarie University;

social and economic impacts, guided by the need to further sustainable development.[33]

Integrated EA here is defined as the assessment of environmental, economic and social impacts (the fourth category). This may include environmental, economic and social impacts of PPPs as well as projects, and there is therefore an important link between integrated EA and SEA. Integrated EA is becoming more common because of the broad definition increasingly given to 'environment' where it appears in legislation or policy guidance; this is important because of its role with regard to sustainable development.[34]

Projects adopted by a specific act of parliament are an important example of integrated EA.[35] These operate in a number of jurisdictions, and have been criticised as a method of 'fast tracking' proposals which would otherwise undergo EA in more routine ways. Early examples include provisions in the Queensland *State and Regional Planning and Development, Public Works Organisation and Environmental Control Act* 1971, and the Victorian *Economic Development Act* 1981. The New Zealand *National Development Act* 1979 is another example, which applied to projects of 'national importance' and gave the government the power to issue the relevant permits normally required.[36]

More recent provisions include the exemption available under the European project EA Directive, and the provision for Integrated Assessments to be carried out on Projects of State Significance under the Tasmanian *State Policies and Projects Act 1993.*

Where these provisions are required to incorporate environmental considerations during the passage of legislation, there are some similarities between the process and legislative EA. This is because

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and UK Department of the Environment, 1991. *Policy Appraisal and the Environment*, HMSO: London, chapter 4, 'The Costs and Benefits of Policy Options'. For an argument of the need to put CBA 'back' into EA, see Hundloe, T, McDonald, G, Ware, J, and Wilks, L, 1990. 'Cost-Benefit Analysis and Environmental Impact Assessment', 10 *Environmental Impact Assessment Review*, pp 55-68.

33 Sadler and Verheem, op cit n 7, pp 36-37

34 Note Caldwell's view that all impacts are in a sense environmental, as the idea of interactive relationships is implicit in the word environment. See Caldwell, L, 1989. 'Understanding Impact Analysis: Technical Process, Administrative Reform, Policy Principle', p 7.

35 Wood, C, 1995. *Environmental Impact Assessment: A Comparative Review*, Longman: Harlow, pp 35 and 88.

36 Bates, op cit n 5, pp 137-139.

although the former are designed to directly implement specific projects, in most cases they indirectly serve to also implement economic policy; the latter can be distinguished as it serves to directly implement all types of policy.

SEA is more closely linked with cumulative EA,[37] which has been defined by regulations in the United States as the 'assessment of the impact on the environment which results from the incremental impact of an action when added to past, present or other reasonably foreseeable actions'.[38]

Although there are presently few legislative provisions for cumulative EA in Australia, the tool is increasingly used in environmental planning and management. An example is the studies prepared for revisions to the Hawkesbury-Nepean Regional Environmental Plan in NSW, where particular regard was given to water quality. The planning approach taken was to adopt a total catchment management policy, setting water quality objectives for the catchment based upon development scenarios for the Greater Metropolitan Area. In this way, it was hoped to deal with likely cumulative impacts before they arose.[39]

A number of writers have recognised that cumulative environmental impacts result not only from the combination of projects, but also from the combination of PPPs either at the same or at different levels.[40] This often results from a division of authority in government, where there is a failure to appreciate that a holistic or 'whole of government' approach is needed to environmental issues.[41] An example may be seen in the impacts from the European *Less Favoured Areas Directive,* which guaranteed payments to support livestock in rural areas. These illustrate its conflict

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37 Also known as cumulative effects assessment (CEE) or cumulative impact assessment (CIA). See Scott Wilson Resource Consultants, op cit n 15, pp 43-44.

38 US Council on Environmental Quality, *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act 1978* 40 CFR 1500-1508.

39 Court, J, and Associates Pty Ltd and Guthrie Consulting, 1994. *Assessment of Cumulative Impacts and Strategic Assessment in Environmental Impact Assessment*, Commonwealth of Australia, p 4.9

40 Integration of all facets of European Community policy was stressed in the Third Environmental Action Plan, to ensure that policies from different sectors of the Community were not in conflict. Where such conflict does exist however, it should be the result of a conscious decision that one take precedence over another, rather than as a result of a failure to detect it. Council of the European Communities, 1980. *'Third programme of action on the environment* (1982-1986)', Official Journal, L229, 30.8.80, pp 30-48. For an illustration of conflicting policies, see Wathern, P, 1988. *Environmental Impact Assessment: Theory and Practice*, Routledge: London, p 20.

41 Vig, N, and Kraft, M, (ed), 1990. *Environmental Policies in the 1990's: Toward a New Agenda*, Congressional Quarterly Press: Washington DC, p 8.

with other policies, in particular legislation for nature conservation and access to the countryside:

> Increasingly, policies emanating from different sectors are seen to be in conflict. Thus, the policies which provide capital grants for farm improvement and headage payments to encourage agricultural production in many situations conflict with the provisions for landscape and wildlife conservation embodied in various aspects of environmental legislation. Similarly, grant aid for fencing encourages farmers to fence upland areas, impeding the use of these for recreation, one objective of multiple-use policy.[42]

The need to link the assessment of cumulative and strategic impacts has been the subject of research in Australia, where cumulative EA and SEA were seen to contribute to sustainable development.[43] The relationship between both is one of timing. The overriding objective of SEA is the achievement of sustainable development, which comes through greater integration and coordination of environmental policy making. Time and cost savings are achieved through its use, as SEA sets a framework for EA. As a result EA is streamlined, and cumulative impacts at all levels mitigated. In an advanced SEA system there would presumably therefore be less cumulative impacts and less need for cumulative EA, whether of projects or PPPs.

The difficulty that arises is that cumulative impacts are likely to be greatest at all levels when integration and coordination are lacking. As this is often the time when significant changes are being made, it is essential that greater consideration be given to cumulative EA of PPPs as well as projects. It is here that cumulative EA and SEA are linked, as development of the latter must ensure that development of the former is not neglected. Whilst the trend to date has been to view cumulative EA at the project level as best achieved within SEA, cumulative EA of PPPs should not be overlooked.

Sustainability Assurance is a recent concept, having grown from the International Study into the Effectiveness of EA. Two aspects were emphasised in early documentation: the need to translate the principles of environmental sustainability into operational terms, and the need to recast procedures and methods for application. The precautionary principle is

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42 Op cit n 20, p 327.

43 Op cit n 39, p ii.

important in ensuring that EA is converted 'from a tool for impact minimisation to an instrument for achieving sustainable development...'[44]

The concept is developed further in an Interim Report and Discussion Paper prepared for the International Study, where it is termed 'environmental sustainability assessment' (ESA). The maintenance of natural capital is emphasised, with impacts not to exceed the 'carrying capacity' or safe limits of the resource, beyond which any ecosystem will not survive. However the logic is to go beyond existing theories of carrying or assimilative capacity, which are believed to be based on political judgements, and recognise that making political decisions that are contrary to carrying capacity are untenable.[45]

Redesigning EA and SEA are recognised as important steps in giving better effect to such sustainability concepts. The main steps outlined are: to modify EA procedures to incorporate a 'no net loss' criterion, applying SEA to 'scope towards sustainability' by indicating likely impacts which will inhibit sustainable development, using EA to address global change, and integrating EA with other policy and planning processes. With regard to SEA, the following measures are recommended:

i) screening economic and development policies for their conformity with environmental sustainability goals and principles;
ii) preliminary assessment of development proposals to identify low-impact, resource efficient alternatives (e.g., for energy, transportation, etc.);
iii) more detailed sectoral assessment to facilitate early identification of potential cumulative effects; and
iv) regional assessment to clarify cumulative effects on resource values, land use capabilities, ecological integrity and biodiversity.[46]

The development of screening indicators is rightly identified as crucial to success, the traditional approach of employing discretion or proposal lists to guide significance (discussed in the previous chapter) rapidly becoming outdated. A number of criteria are possible, including limits on greenhouse gas emissions, acidification and toxic substance release. The preservation of a percentage of the resource base is also often listed, to ensure the protection of bio- and other aspects of diversity.[47] Integrating SEA with

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44 Sadler, B, 1994. *International Study of the Effectiveness of Environmental Assessment: Proposed Framework*, FEARO/IAIA, p 10.

45 Sadler, B, 1995. *International Study of the Effectiveness of Environmental Assessment, Environmental Assessment: Toward Improved Effectiveness*, Interim Report and Discussion Paper, CEAA, p 42.

46 Ibid, p 49.

47 Scott Wilson Resource Consultants, op cit n 15, pp 67-69.

other policy instruments is recommended, for instance by ensuring that PPPs are consistent with sustainable development strategies (SDSs).[48] These may be implemented nationally by NSDSs or regionally or locally, (see section 1.2 regarding NSW).

Sustainability Assurance is nowhere near the stage of development of either EA or SEA, and remains an emerging concept only, to which much further consideration needs to be given.[49] Its real potential lies in its ability to address the substantive dimension of effectiveness, evaluation of practical environmental outcomes as opposed to procedural reforms. Once substantive criteria are adequately developed in the future, the ability to predict and measure change through the use of Sustainability Assurance will be greatly enhanced.

b. Improving EA

There have been a number of criticisms made of EA, including: limited application to projects specified in screening lists, minimal information requirements, limited consideration of alternatives and mitigation measures, inadequate public participation, financial constraints and timing, perception of bias where the organisation that carries out the EA is the proponent, weak influence of the assessment on the decision making process, undeveloped monitoring techniques, and the reactive nature of the process.[50]

Some of these may be best improved by updating EA; for example involving the public in scoping may improve the consideration of alternatives, and the perception of bias may be overcome through adequate review mechanisms. However others are more likely to be improved by using SEA;[51] for example the difficulties presented by ancillary developments, foreclosure of alternatives, management practices

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48 Sadler and Verheem, op cit n 7, p 158.

49 Note however that Danish SEA as practiced under the Administrative Order, has recently been described as 'sustainability assessment'. See Therivel, R, 1997. 'Strategic Environmental Assessment of Policies in Europe', in *EIA for the 21st Century, Conference Proceedings*, Harvey, N and McCarthy, M (ed), University of Adelaide, pp 21-29. For another recent discussion of the concept, (here termed 'sustainability analysis'), see Clark, B, 1998. 'Sustainability Analysis', 6(1) *Environmental Assessment*, p 11.

50 Therivel et al, op cit n 21, pp 16-17 and 20-22.

51 Wathern, op cit n 40, p 19.

and class impacts, each of which are related to one another and the latter which was considered above.[52]

Ancillary developments occur in response to certain major projects, the construction of the European Channel Tunnel between Britain and France being a good example. Here improvements to the rail system of the UK and the development of major trans-shipment facilities were necessary as a result of the construction of the tunnel. Although the impacts from these were likely to exceed those of the Tunnel itself, they were not included within the main EIS. In addition, because these impacts were assessed separately, cumulative impacts could not be adequately considered.

Foreclosure of alternatives occurs where PPPs are not considered prior to specific projects, and the Channel Tunnel is also a good example of this. Once a major economic policy decision had been taken to proceed with the Tunnel, it was too late by the construction stage for alternatives to be considered. If SEA had been applied to economic/transport policy, alternative transport strategies could have been preferred which may have had better all round outcomes. There are many other examples of how a failure to assess decisions at appropriate decision-making levels may inhibit effective assessment, of which the following transport and energy proposals are illustrative:

- The planning and design of a motorway section may be constrained by an earlier decision to build the motorway, part of which may already have been constructed. In turn, the decision to build the motorway may be constrained by an earlier decision to construct a motorway network as the preferred means of meeting national transport needs.
- A proposal to build a particular nuclear power station may result from earlier energy policy and planning decisions related to energy requirements and the most appropriate means of meeting these.[53]

In Australia there are also many examples of this occurring. As part of the SEA/cumulative EA consultancy report prepared for the public review of the Commonwealth EA process, case studies on open-cut black coal mining and the coastal zone were prepared.[54]

The coal mining study drew attention to energy development of national, (and international, given the release of 'greenhouse' emissions), significance, that usually aggregate in particular regions such as the

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52 Lee and Walsh, op cit n 9, pp 129-130.

53 Ibid, p 129.

54 Court, J, and Guthrie Consulting, op cit n 39, pps 7.2-7.22.

Hunter Valley. A number of cumulative impacts were discovered within the region. These resulted from: combined operations, associated land degradation and habitat loss, water and air quality and social impacts. Consideration of alternatives was believed to be necessary at the time of energy policy formulation, as any subsequent development would not permit alternative policies to be considered; this would only serve to exacerbate existing impacts.

The coastal zone study was identified for its contrasting impacts, with the zones of northern-central Queensland and northern New South Wales singled out for particular concern. The study is of particular interest as it highlights how a number of policies may be in direct conflict with one another, such as those of tourism, housing, transport, sand mining and fisheries. Although policies exist for some of these, a failure to coordinate them with one another may also result in alternatives being foreclosed and cumulative impacts.

Management practices are non project actions directed by government, which may be more appropriately assessed at the PPPs level. Changes in farming and forest management practices are examples, and as these may promote the increased use of fertilisers and pesticides, livestock intensification and the removal of hedgerows, there is clearly great potential for impact; as such, they may be better assessed under SEA.[55]

In Australia, recent examples of management practices being more effectively assessed under SEA include National Environmental Protection Measures.[56] These are specific statements of policy which have great potential for impact, particularly where coordination is lacking. They include Measures for Ambient Air Quality and the Movement of Controlled Waste Between States and Territories.[57] Impact statements are to be prepared on the measures, and these are to consider both environmental, economic and social impacts. They are also to be consistent with the IGAE and relevant international agreements, and discuss regional differences. As the EIS is to reflect the impact of implementation of the

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55 Ibid, p 130.

56 Following the *Intergovernmental Agreement on the Environment* (IGAE), the National Environment Protection Council (NEPC) was established, with the objective of formulating measures and reporting on their effectiveness. This was to ensure that jurisdictional overlaps in quality controls were avoided.

57 National Environmental Protection Council, Draft *National Environmental Protection Measure and Impact Statement for Ambient Air Quality*, (November 1997); *National Environmental Protection Council, Draft National Environmental Protection Measure and Impact Statement for the Movement of Controlled Waste Between States*, (January 1998).

measure in all jurisdictions, clearly SEA is the tool to be used for this purpose.

2. Historical overview

This section will examine the developments that have led to SEA, to give an understanding of its changing nature. SEA remains in a state of flux, with its purpose, rationale, scope and difficulties still being debated. This as much due to changed perspective's concerning the role of sustainable development, as the role of SEA. The influence of land use planning and policy analysis upon the development of plans and legislative proposals is considered, to illustrate the significant application of SEA to these proposals to date.

Assessing PPPs for their impact on the environment is nothing new. Bartlett gives the examples in the US of the post-Civil War surveys, John Leslie Powell's reports on the likely impact of settlement on the western US, the river basin planning techniques of the US Army Corps of Engineers which date to 1870, and the emphasis given to future consequences of urban and natural resource planners beginning in the 1950's. He comments:

> Impact assessment clearly is one of the major innovations in policy making and administration of the twentieth century. It has its origins in the historical efforts of some bureaucrats, legislators, and government reformers to analyze the likely consequences of possible government actions prior to adoption and implementation.[58]

What is new is the recognition of the possible application of EA methods and procedures to PPPs, which draws on the full potential of NEPA. Wathern et al stress the advantages that a system of policy appraisal would bring, in particular the opportunity to employ the 'precautionary principle', where caution is exercised in the face of uncertain outcomes. As seen in Chapter 2, this is an important aspect in ensuring sustainable development:

> Adopting a system of policy appraisal would represent a significant advance in environmental management. It would provide an opportunity to anticipate, and hopefully ameliorate, the adverse environmental effects of a policy at an early stage in its formulation... it should be seen as an inevitable part of the

58 Bartlett, R, 1989. 'Impact Assessment as a Policy Strategy', in Bartlett, R, (ed), *Policy Through Impact Assessment*, Greenwood: New York, p 1.

> trend towards anticipatory, rather than purely reactive, environmental management...[59]

Over the last thirty years, legislation in California (1970),[60] Western Australia (1986),[61] the Netherlands, (1987 and 1994),[62] and New Zealand (1991)[63] has established a basis for the application of SEA. Although some success has been achieved with plans and programs, difficulties have been experienced in applying SEA to government policies. In consequence, more recent measures in Canada (1990),[64] and the Netherlands (1995)[65] have been introduced by policy rather than law, and rigorous EA methods and procedure are largely absent. Together with NEPA and a few other examples in Denmark (1993),[66] Finland (1994),[67] and the European Union (1994),[68] the Canadian and Dutch procedures apply SEA to legislative proposals. Australia has a proposed new statute for EIA which contains provisions for SEA; although not specifically stated, it is possible that these may also be applicable to legislative proposals (see Chapter 4, section 5).

2.1 EA and land use planning

The link between land use planning and EA is a close one, and is being strengthened in some jurisdictions.[69] Although NEPA is an exception, EA and SEA have largely developed within a land use planning context, which are increasingly guided by sustainable development. Examples from New South Wales (NSW), Australia, and New Zealand are illustrative of this.

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59 Wathern et al, op cit n 20, p 29.

60 *California Environmental Quality Act* 1970.

61 *Environmental Protection Act* 1986

62 *Environmental Impact Assessment Decree* 1987 and the *Environmental Management Act* 1994.

63 *Resource Management Act* 1991.

64 Cabinet Directive requiring an *Environmental Assessment Process for Policy and Program Proposals* 1990.

65 *Environmental Test* 1995.

66 *Administrative Order No 31* 1993.

67 *Guidelines for the Environmental Assessment of Plans, Programmes and Policies in Finland* 1994.

68 'The Green Star System' 1994. See Norris, K, 1996. 'The European Commission Experience', in Jaap de Boer, J, and Sadler, B, 1996, *Environmental Assessment of Policies: Briefing Papers on Experience in Selected Countries*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer, pp 51-56.

69 For a helpful early commentary in Australia which illustrates links with pollution control also, see Fowler, R, 1982. *EIA, Planning and Pollution Measures in Australia*, AGPS: Canberra.

NSW has a long-standing statutory framework for incorporating EA into all planning levels. The *Environmental Planning and Assessment Act* 1979 includes requirements for strategic planning, and development control; the former designates land use through the production of policies and plans, and the latter examines each application for the use of land requiring approval. Strategic plans may be either State environmental planning policies (SEPPs), regional environmental plans (REPs) or local environmental plans (LEPs); development at either level must be in accord with these policies and plans.

EA is integrated within this legislative framework, and regulations set out a number of developments which have been 'designated' and require an EIS. Other applications must also give consideration to the impact of the development upon the environment, and indicate what measures will be taken to mitigate any likely adverse impacts.[70] Where an EIS is required, proponents must comment upon the implications of the project for sustainable development.[71]

New Zealand's resource management legislation is perhaps the most far-reaching of all planning based legislation, and is guided by the objective of 'sustainable management.' The *Resource Management Act* 1991 (RMA) provides a comprehensive framework for integration,[72] and is supported by the powers of an independent Parliamentary Commissioner for the Environment (PCE) charged with ensuring compliance (see section 1.1a above).[73]

In a similar way to the NSW legislation, a framework of policies and plans is established consisting of: national policy statements, regional policy statements and regional district plans. Unlike NSW, there are clear requirements for each to be assessed for their environmental impacts, which introduce SEA. The RMA ensures a clear link between assessment and planning, although to date only one national policy statement has been released and assessed, and little guidance has been made available

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70 Bates op cit n 5, pp 116-118, 124, 128-130, and 156-162.

71 There is little reference in the legislation outside of this, see Sperling, K, 1997. 'Beyond Development Control: Creating a Planning Framework for Sustainability', *Australian Environmental Law News* 3, pp 26-31, note 3.

72 Gow, op cit n 17.

73 See Buhrs, T, 1996. 'Barking Up Which Trees? The Role of New Zealand's Environmental Watchdog', *Political Science* 48(1) pp 1-28.

to the regions which are expected to carry out most of the Acts' requirements.

a. Public inquiries

Inquiry mechanisms are present in the legislation of a number of countries to evaluate in greater detail the implications of development proposals. These have much in common with SEA, as when there is no policy guiding a project a vacuum arises, and there are opportunities to consider the policy context underlying the proposal.[74] In the UK such inquiries became known as 'Big Public Inquiries',[75] as the limitations of the site specific focus of land use planning arose.[76] Well known examples worldwide include the Sizewell B Nuclear Inquiry in the UK,[77] the Mackenzie Valley Pipeline Inquiry in Canada,[78] and the Ranger Uranium Inquiry in Australia.[79]

Prior to its abolition in 1993, the Australian Resource Assessment Commission (RAC) was also involved in national inquiries of this type, and both the Forest and Timber Inquiry and the Coastal Zone Inquiry dealt with issues of major national significance. The RAC was required to take an integrated approach to inquiries and to have regard to both efficiency, ecological integrity and equity. Commentators have spoken favourably of its role, as it contributed to advancing both SEA and sustainability. For example '[t]he Inquiries conducted by the former RAC into national resource issues clearly constituted strategic assessments of environmental significance...'[80]

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74 Therivel et al, op cit n 21, pp 33-34.

75 Outer Circle Policy Unit, 1979. *The Big Public Inquiry*, The Outer Circle Policy Unit: London.

76 O'Riordan and Sewell, op cit n 32, p 39.

77 O'Riordan, T, Kemp, R, and Purdue, M, 1988. *Sizewell B: An Anatomy of an Inquiry*, Macmillan: London.

78 Berger, T, 1988. *Northern Frontier Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*, Douglas and McIntyre: Vancouver, and Sewell, W, 1981. 'How Canada Responded: The Berger Inquiry' in O'Riordan, T and Sewell, W, (ed) *Project Appraisal and Policy Review*, Wiley and Sons: Chichester, pp 77-94.

79 Ranger Uranium Environmental Inquiry, 1977. *Second Report*, AGPS: Canberra. See also Formby, J, 1981. 'The Australian Experience' in O'Riordan, T, and Sewell, W, (ed) *Project Appraisal and Policy Review*, Wiley and Sons: Chichester, pp 199-209 and Richardson, B, and Boer, B, 1995. 'Federal Public Inquiries and Environmental Assessment' 2(2) *Australian Journal of Environmental Management* pp 90-103. For a comparison with the Mackenzie Valley Pipeline Inquiry (above), see Althaus, C, 1994. 'Legitimation and Agenda-Setting: Development and the Environment in Australia and Canada's North', in Weller, P, (ed), *Royal Commissions and the Making of Public Policy*, Centre for Australian Public Sector Management: Brisbane, pp 186-197.

80 Op cit n 39, p 5.3.

The Forest and Timber Inquiry was required to identify and evaluate options for the use and management of Australia's forest and timber resources, and take into account both existing strategies and alternatives suggested by the industry and conservation movement. Five policy alternatives were identified following the application of sustainability principles and criteria, although a preferred alternative was not specifically put to the government.

The Coastal Zone Inquiry was particularly concerned with the cumulative effects of coastal development, such as urban sprawl and tourism. The Commission concluded that a national approach was required to address such effects, including the adoption of a longer term perspective, greater community and industry involvement in decision-making, and the use of a range of policy tools to assist in integrated management. Many of these recommendations have subsequently been taken up.[81]

b. Programmatic, class, areawide and regional assessments

Although programmatic, class, areawide and regional assessments operate in different jurisdictions, they have much in common. Programmatic EA is applicable to decisions that initiate specific projects under NEPA, with EISs prepared for groups of federal actions that are related either: geographically (such as those within the same area, like a metropolitan district); generically (such as those which are similar in certain respects, including subject matter or method of implementation); or by stage of technical development, (in the treatment of fossil fuels for instance). They illustrate the usefulness of 'tiering' projects through PPPs, which enable earlier programs to be assessed, thereby avoiding subsequent duplication regarding projects (see section 3). If they are well prepared, they can anticipate potential environmental problems, prevent future delays, help in long-range planning, and address cumulative impacts.[82]

Class EA has been applied in Ontario, Canada to activities that are too small to merit individual assessment, but are likely in combination to result in cumulative effects. Municipal water / sewer and road projects are a

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81 Mills, R, 1994. 'The Resource Assessment Commission: Policy Advice and Who to Believe', in Weller, P, (ed), *Royal Commissions and the Making of Public Policy*, Centre for Australian Public Sector Management: Brisbane, pp 163-185.

82 Sigal, L, and Webb, W, 1989. 'The Programmatic Environmental Impact Statement: Its Purpose and Use' 11 *The Environmental Professional*, pp 14-24.

good example of this. Class EA is now also being applied to major development plans and programs.[83]

Areawide assessment was first used by the US Department of Housing and Urban Development (HUD) to comply with the NEPA requirement to consider the cumulative long term effects of its activities,[84] and regional assessments have since become popular outside the US to support land use planning processes.[85] Both are ways of looking beyond the site-specific focus of individual projects, and have much in common with programmatic EA when they assess proposals in particular areas.

2.2 Policy analysis and legislative proposals

The development of SEA from policy analysis is something which has been largely overlooked.[86] Policy analysis continuously evaluates policies as they are planned and implemented in terms of the objectives they are designed to meet. Although SEA may correspond more closely with EA procedurally and methodologically where projects are directly influenced by PPPs, where this is not the case policy analysis procedures and methods may be more appropriate.[87] There is a need to come to terms with different definitions of policy in order that the relationship between SEA and policy analysis is clear; policy assessment may be the most appropriate use of terminology which links SEA and policy analysis.[88]

'Policy' in general is of many types, and it is necessary to be clear which of the possible senses of the word are being used. For example, it could be used to describe a field of activity, such as general environmental policy. Alternatively, it could be used as an expression of a desired state of affairs, such as sustainable development. It could also be used as a

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83 Gibson, R, 1993. 'Ontario's Class Assessments: Lessons for Policy, Plan and Program Review', in Kennett, S (ed), *Law and Process in Environmental Management*, Canadian Institute of Resources Law: Calgary, pp 84-99.

84 US Department of Housing and Urban Development (HUD), 1981. *Areawide Environmental Impact Assessment: A Guidebook*, HUD: Washington DC.

85 Sadler and Verheem, op cit n 7, p 54.

86 This is however now changing; for examples, consider Thissen, W, 1997. 'From SEA to Integrated Assessment: a Policy Analysis Perspective, 5(3) *Environmental Assessment*, pp 24-25; and Kornov, L, 1998. 'Strategic Environmental Assessment and the Limits of Rationality in Decision Making Processes', *Paper presented to the IAIA Annual Conference*, Christchurch.

87 Op cit n 7, p 171.

88 Boothroyd, P, 1995. 'Policy Assessment', in Vanclay, F, and Bronstein, D, *Environmental and Social Impact Assessment*, Wiley and Sons: Chichester, p 94.

substitute for specific proposals, such as reductions in the level of atmospheric emissions. Finally, it could be used in the sense of a formal authorisation, which would generally involve a piece of legislation which could permit the release of atmospheric emissions.

Similarly, it is important to be aware of the type of 'analysis' proposed. With regard to legislative proposals, it is possible to ensure that assessment takes place at a number of different stages. Of most benefit in order to enable consideration of need and alternatives, is assessment during the formulation stage. This is because the earlier a policy is assessed, the more opportunities there are to widen the scope of application and ensure each alternative is adequately considered (see section 4.2). However if the policy contained within the proposal is not clearly defined at this time this may cause difficulty. Hogwood and Gunn conclude:

> The key lessons that should emerge are that it should always be made clear in which of the many possible senses of 'policy' the word is being used and that the student or practitioner should always be clear in his or her mind what type of analysis he or she is conducting. [89]

The development of SEA from policy analysis may be distinguished from its development from EA and land use planning. Examples of where SEA has developed from policy analysis are its application to privatisation, structural and sectoral programs, trade agreements and legislative proposals.[90] These indicate that while it is important to understand the context of land use planning if EA or SEA requirements are to be introduced within this context, it is also important to understand the context of policy analysis for the application of SEA to PPPs developed under that context. In addition, either different procedures and methods are likely to be required, or they must be applied in a flexible and selective manner.

Applying SEA to legislative proposals is analogous to applying SEA to land use planning; each comprises established procedures, leads to formal documentation and involves the public to a significant extent. It may well be that these three aspects are the key to forming a basis for effective legislative EA, as the application of SEA to land use planning is familiar to

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89 Hogwood, B, and Gunn, L, 1988. *Policy Analysis for the Real World*, Oxford University Press: Oxford, p 31.

90 Op cit n 15, pp 51-60.

many now and has had some measure of success, both institutionally and publicly. While it would be difficult to draw anything other than very general conclusions for SEA application elsewhere, these three aspects are well recognised as significant, and will be considered in some detail in Chapters 7 and 8.[91]

a. Integrated EA

The Channel Tunnel development between Britain and France is an example of the application of integrated EA to legislative proposals (see section 1.2b). This is typified by an overreaching economic policy context for site specific projects, and although environmental, economic and social impacts should receive equal consideration, economic aspects tend to dominate. A specific act of legislation is used to override the operation of potentially more rigorous planning and EA requirements, and in both the Netherlands and Denmark some aspects of EA are applied in this way.[92] Although these are exempt from the general provisions of the European Directive[93] and usually deal with matters of economic policy, they are akin in some ways to legislative EA.[94]

In Australia integrated EA is becoming more common (see examples in Chapter 3, section 1.2a). In 1997, the *Integrated Development Assessment White Paper and Exposure Draft Bill* 1997 was released by the NSW government. It proposed expanding the power of the Minister for Planning to assess and approve development 'of State and regional significance'. As well as taking precedence over existing legal requirements, the provision would seriously restrict community participation in planning decisions. These provisions are now contained within the *Environmental Planning and Assessment Amendment Act* 1997.

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91 As will be seen, they form three of five criteria used to evaluate legislative EA in Denmark (the other two being significance and alternatives). See Elling, B, and Nielson, J, 1996. *Environmental Assessment of Policies: PHASE 1*, Centre for Environmental Assessment, Department of Environment, Technology and Social Studies, Roskilde University: Roskilde.

92 Wood, op cit n 35, pp 35 and 88; and Gilpin, A, 1995. *Environmental Impact Assessment: Cutting Edge for the Twenty-First Century*, Cambridge University Press: Cambridge, p 76.

93 Note that the European Union (EU) and the European Community (EC) are referred to by the generic term European in this thesis. This overcomes the difficulty of needing to refer to pre-Union Directives as Community Directives.

94 As will be seen, the early use of the legislative EIS in the US was often with regard to projects with a clear economic policy agenda; see *Environmental Defense Fund v Tennessee Valley Authority* 339 F2d, 2 ELR 20726 (6th Cir. 1972) which involved the construction of the Tellico Dam and Reservoir and included a new town for 50,000.

b. Regulatory reform

Mitigation of economic impacts was an early focus for assessing legislative proposals. Regulatory reform was quick to meet concerns in the 1970's about over-regulation by government, and this mirrored the emphasis of cost benefit analysis (CBA) as a project appraisal technique prior to EA.[95] Social impact assessment (SIA) also developed in the 1970's to plan, investigate and manage social change, and it was often used in the development of legislation.[96] As these techniques grew and EA became established, it was extremely likely that concern for environmental impacts would match those economic and social impacts which had been on the agenda for some time.

In Australia the Cabinet Handbook of the Commonwealth Government contains specific Impact Statement requirements for Business Regulation and Legal Services,[97] and Cabinet documents are now required to give consideration to ESD. Objective 16.1 of the National Strategy for Ecologically Sustainable Development is to 'to ensure Cabinet processes facilitate the integration of economic, environmental and social considerations into decision-making'.[98] ESD Guidelines are provided in clauses 5.40 and 5.41 of the Handbook. Clause 5.40 is explanatory, and clause 5.41 lays down the procedure.

> While ESD considerations should be borne in mind during the development of all Cabinet documents, only those documents which concern significant economic, environmental and social issues that have the potential to affect ecological processes must indicate the ESD implications. Drafters should refer to the guiding principles of ESD, as set out in pages 8 and 9 of the National Strategy for Ecologically Sustainable Development. Early consultation with the Department of the Environment, Sport and Territories is recommended as a means of clarifying the question of when to address ESD considerations.[99]

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95 For further information here, see Boothroyd, P, 1995. 'Policy Assessment', in Vanclay, F, and Bronstein, D, (ed), *Environmental and Social Impact Assessment*, Wiley and Sons: Chichester, pp 83-126.

96 Taylor, C, Goodrich, C, Hobson Bryan, C, 1998. 'Social Assessment' in Porter, A, and Fittipaldi, J (ed), *Environmental Methods Review: Retooling Impact Assessment for the New Century*, Army Environmental Policy Institute: Fargo, p 210.

97 Department of Prime Minister and Cabinet, 1994. *Cabinet Handbook*, AGPS: Canberra, clauses 5.35-5.39 and 5.32.

98 Commonwealth of Australia, 1992. *National Strategy for Ecologically Sustainable Development*, Commonwealth of Australia.

99 Respondents to the EPA consultancy also recommended that a section on EIA should specifically be incorporated into Cabinet submissions, op cit n 39, p 1.14

In South Australia proposed legislation is to be considered by the Cabinet following its drafting, and environmental impact is one of the issues to be evaluated.[100] Tasmania's Cabinet Handbook has provision for a Legislative and Regulatory Impact Statement in clause 3.13, which focuses on the impacts of proposed legislation on government de-regulation and micro-economic reform. There is also provision for the production of a wide range of other 'Annex Statements', which could include EISs.[101] Queensland has a statutory mechanism for considering legislative proposals, with a requirement to produce a Regulatory Impact Statement.[102] This could also be amended to include explicit provision for environmental impacts.[103]

c. Ad hoc processes

Ad hoc processes for assessing legislation have been present for some time, and these include the public inquiry, (see section 2.1a), 'round tables', and royal and parliamentary commissions.[104] In Canada, round tables have been extremely useful in consensus building on the best legislative approach to relevant environmental issues; in the UK, royal and parliamentary commissions have traditionally played important roles in scrutinising government policy and legislation; and in Australia, the Resource Assessment Commission played an important role in examining future legislative options[105] (see section 2.1a). Each process has commonly been used to integrate environmental, economic and social concerns.

There are other ad hoc approaches available, although they are less likely to be used to assess legislative proposals, whether directly or in advance of implementation. Program evaluations and internal audits are helpful for example, and enable government programs to be regularly evaluated and

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100 Department of Premier and Cabinet, (SA) 1994. *Cabinet Handbook*, Cabinet Office, as updated, p 13.

101 Statements included are Financial Impact Statement, Economic and Employment Impact Statement, Family Impact Statement, Intergovernmental Relations Statement and a Public Impact Statement. See Department of Premier and Cabinet (Tas), 1996. *Cabinet Handbook*, Cabinet Office, pp 12-16.

102 In Queensland see the *Statutory Instruments Act* 1994.

103 For further discussion on these Australian measures, see Marsden, S, 1997. 'Applying EIA to Legislative Proposals: Practical Solutions to Advance ESD in Commonwealth and State Policy-Making', 14(3) *Environmental and Planning Law Journal*, pp 159-173.

104 See Scott, S, 1992. *Environmental Considerations in Decision Making: A Role for EIA at the Policy Level?*, MES Thesis, Dalhousie University: Halifax, pp 88-94.

105 See Richardson, B, and Boer, B, 1995. 'Federal Public Inquiries and Environmental Assessment', 2(2) *Australian Journal of Environmental Management*, pp 90-103.

policies monitored, possibly for environmental impact. However even if based upon legislation, they operate after implementation and therefore could not be termed 'proposals' as defined.[106] Similarly, operational performance plans may identify policies and programs to be implemented in the next financial year;[107] these could be broadened to include wider environmental issues, although as they are likely to be released in advance of legislative drafting instructions, they could not be termed 'legislative'.

3. Application

While EA has traditionally focused on an analysis of the effects of particular development proposals, NEPA never intended this and theoretically its application is far wider.[108] To date the only requirements for SEA have applied exclusively to the public sector, although even here, they have often not been implemented.[109] This section considers the application of SEA, and, in particular, differences between: PPPs, proposed and existing PPPs, and environmental and non-environmental PPPs. It also considers the application of SEA to legislative proposals: specifically implementation of PPPs and projects, and types of legislative proposal. This should show that although SEA is applied to a number of areas, there is still room for further application. In particular, there is a need for SEA to be further applied to legislative proposals, and it should be applied to existing as well as to proposed PPPs.

3.1 Policies, plans and programs

SEA is applied to a number of different proposals, which are usually either sectoral, regional, and indirect. The diversity of these is great, and case studies have been documented in a number of publications over the last

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106 These roles may be enhanced by an independent office of an Auditor General or Ombudsman.

107 See Bregha, F, Benidickson, J, Gamble, D, Shillington, T, and Weick, E, 1990. *The Integration of Environmental Considerations into Government Policy*, CEARC, p 7.

108 Webb, J, and Sigal, L, 1992. 'Strategic Environmental Assessment in the United States', *Project Appraisal* September pp 137-142.

109 Note that while the author has found no examples of SEA being applied to the private sector (excluding privatisation itself), this is not to say that elements of environmental evaluation are not undertaken there. Today, many of the most advanced processes of environmental management occur in the private sector, with Environmental Management Systems (EMS) and techiques of environmental auditing illustrating this.

ten years.[110] With the exception of legislative proposals, these are not described in any depth in this thesis as most are well referenced in the literature.

Sectoral and regional proposals concern particular activities or are based within geographical areas, and deal with them in a comprehensive way. Sectoral examples include plans and programs for waste disposal, water supply, agriculture, forestry, energy, recreation and transportation. Regional examples include metropolitan and city plans, and community, redevelopment and rural plans.[111] Indirect proposals are implemented at a national or regional level and are therefore to an extent removed from those to whom they impact upon.[112] Examples include policies for science and technology, finance, trade, taxation, and justice enforcement.[113]

The principal application of SEA to date has been to plans and programs, with a more limited number of policy proposals assessed.[114] The majority of the former have been connected with land use planning, and the majority of the latter are legislative proposals. Legislative proposals may however be direct or indirect in application, may play an intrinsic part in implementing any program, and may also be described as projects if they are used to implement specific proposals adopted by legislation (see sections 1.2a and 2.2a).

a. Proposed and existing PPPs

Given that the application of EA has traditionally been to proposed activities and not to existing ones, most practitioners believe that SEA should focus on these. However this does not have to be the case, and SEA may be utilised in a similar way to policy review.[115] Policy review may be distinguished from policy analysis in that it is designed to audit subsequent policy implementation; as such, a distinction may be drawn

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110 As an illustration of the range of these, the reader is directed to Pt III of the SEA bibliography, which references a number of case applications; Partidario, op cit n 2.

111 See also Buckley, R, 1994. 'Strategic Environmental Assessment' 11(2) *Environmental and Planning Law Journal,* p 166.

112 For recent examples see Therivel and Partidario, op cit n 4, pp 47-178.

113 Therivel, R, 1993. 'Systems of Strategic Environmental Assessment', 13 *Environmental Impact Assessment Review,* pp 161-162; Therivel and Partidario, op cit n 4, pp 157-178; and Scott Wilson Resource Consultants, op cit n 15, pp 51-60.

114 Therivel and Partidario, op cit n 4, pp 21-29.

115 Nicholson, J, 1992. *Environmental Assessment in Policy and Program Planning: A Sourcebook,* Federal Environmental Assessment Review Office, p 2.

between SEA of proposed policies (analysis) and SEA of existing policies (review or audit).[116] Concerns expressed that monitoring is the weak link in EA continue to grow; these will no doubt ensure that greater attention is placed on applying SEA to existing PPPs in the future.

b. Environmental and non-environmental PPPs

SEA should be applied to all PPPs that have the likelihood of significant impact on the environment;[117] this is so whether they are public or private, and whether they have an obvious direct connection with the environment or not. In the latter case, PPPs may nonetheless result in environmental impacts of great significance:

> The need for a systematic procedure is greatest in the case of non-environmental policies. Environmental policies would not normally be expected to cause environmental degradation, and policy appraisal is likely to focus on ascertaining whether they would achieve their objectives. Non environmental policies, however, are more likely to result in unexpected environmental damage.[118]

Although this is generally true, it is important that policies for environmental protection are also evaluated. This is because assumptions regarding the positive nature of environmental regulation are frequently made without due consideration for likely negative aspects. This has also been recognised.[119]

3.2 Legislative proposals

Legislative proposals take a number of forms, and different procedures and methods may be necessary for assessment of them than of plans and programs. The distinction between principal and subordinate legislation is of particular importance, as this often determines whether the proposal may be considered a policy or a project. Both of these are discussed below.

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116 Scott Wilson Resource Consultants, op cit n 15, pages 46-47.

117 See UK Department of the Environment, 1991. *Policy Appraisal and the Environment*, HMSO: London, p 4, and Bartlett, op cit n 19, p 248.

118 Wathern et al, op cit n 20, p 105.

119 Scott Wilson Resource Consultants, op cit n 15, p 60.

a. Implementation of PPPs and projects

It should be clear that when implementing national policy, legislative proposals have great potential for impact, and this is true whether they are designed for environmental protection or not.[120] In Chapter 7, four Canadian examples are considered which have their objective as environmental improvement. Unfortunately, it appears that a number of their outcomes (or intended outcomes) are not in accord with the legislative intention.

A good example is the implementation of the European *Less Favoured Areas Directive* in the UK (see section 1.2a). This was thought likely to result in: loss of upland vegetation and wildlife; impacts upon scenic, water and recreational resources; an increase in farm road construction; impacts upon cultural and heritage sites; and potential conflict with other policies.[121] Impacts from project proposals may however be just as broad; note, for example, the wide-ranging cumulative project and policy impacts that were consequent upon the Channel Tunnel development[122] (see sections 1.2b and 2.2a). It should therefore be remembered that while legislative proposals are an appropriate application of SEA, they may implement projects as well as PPPs:

> Whether bills or other government proposals are concrete projects, rules or guidelines for activities in specific areas, they are extremely relevant as subjects for environmental assessment.[123]

In New South Wales in Australia, environmental and planning laws have been found in a number of instances to be counter-productive. Sperling gives the examples of planning codes for medium density development which perpetuate car dependency, threatened species legislation which does not mandate decisions to protect habitat, and EA legislation which does not identify environmental assets other than in the context of

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120 For an illustration of the range of impacts of policy in general, see Scott, op cit n 104, pp 26-31.

121 Op cit n 20.

122 See Lee and Walsh, op cit n 6. The development was able to proceed as an exemption under the European EA Directive. This provides that projects approved by specific Acts of the member states legislatures are exempt from the Directive - theoretically they are thereby to undergo a form of legislative EA. However it is not known to what extent this exemption is used, or how rigorous are the 'assessments' undertaken in the member states; clearly there is potential for future research here.

123 Elling, B, and Nielson, J, 1996. *Environmental Assessment of Policies: PHASE 1*, Centre for Environmental Assessment, Department of Environment, Technology and Social Studies, Roskilde University Centre: Roskilde, p 12.

development proposals. As a case study, she considers the provisions for protecting koala habitat, which appear to be having little success.[124]

Legislative proposals may best be thought of as a sui generis group of SEA; consequently the design of effectiveness criteria must be careful to appreciate their distinctive characteristics. This is because although basic EA principles may still be applicable, procedural and methodological differences may be significant.[125] Legislative proposals have therefore been described both as explicit policy and 'implementation measures' in the SEA schema. The first is concerned with the highest tier of policy-making and the second includes projects (which may implement economic policy through integrated EA), but excludes policies and programs:[126]

> Policy can be general or specific, stated or implicit, incremental or radical, independent or an element of other policies. Explicit policies can come in various forms: they can be green papers, white papers, ministerial speeches, press releases, statements in the legislature, laws, regulations, and so on.[127]

b. Types of legislative proposal

A common reason why legislative proposals may implement either policies or projects is because proposals are usually of two types: bills and draft regulations (principal and subordinate/delegated legislation). Bills generally implement policy, and draft regulations particular projects. However there have been concerns expressed by some that regulations may be used to amend Acts of Parliament, and therefore take on the parliament's sovereign role in implementing policy. Although regulations are commonly used to specify aspects of statutes under which they are issued, they sometimes go further than this. Indeed, it is important to recognise the general political reality of government policy-making by inaction as well as action, where a government may fail to implement laws introduced by the parliament. These concerns are considered in Chapter 6 where the legal/administrative context of legislative EA is considered.

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124 Sperling, op cit n 71, pp 26-31.

125 Sadler and Verheem, op cit n 7, p 105.

126 Nicholson, op cit n 115, pp 14 and 17.

127 Op cit n 107, p 3; see also Council on Environmental Quality, 1995. *40 Most Asked Questions About the CEQ Regulations*, CEQ: Washington DC - available on NEPAnet, (see US EPA 1995); where policies in question 23b are stated to include ' formally adopted statements of land use policy as embodied in laws and regulations', and question 24a sets out when it is appropriate to prepare an EIS on such policies.

4. Difficulties

A number of difficulties have been raised in the literature regarding the potential of SEA. Some of the better known include the application of EA procedure and methodology, timing of the assessment, whether SEA should be given a legal or policy basis, and issues of confidentiality, accountability and integration. Each of these must be addressed in order that the matters raised in the problem statement in Chapter 1 are fully understood.

Whether EA procedure and methodology can be applied to SEA and legislative EA, and when to apply assessment procedures underlies the approach of Chapters 5 and 6; whether SEA should be given a legal or policy basis is considered in Chapters 7 and 8; issues of confidentiality and accountability are key to the development and application of criteria for evaluating legal and administrative contexts; and, as seen here and in Chapter 4, integration is the driving force behind legislative EA. All of these issues turn on political will, which will be considered in discussing context in Chapters 5 and 6. This section considers whether these difficulties are likely to prevent the successful operation of SEA.

4.1 Procedure and methodology

While the main elements of EA procedure may be duplicated by SEA, differences between EA and SEA may make this impracticable. The precision with which geographical impacts can be defined, and the detail relating to physical development is likely to be less for PPPs than projects. The lead-time of a PPP may well be much longer than for a project, and the decision-making procedures and organisations involved may be more complex for PPPs than projects.[128] As an illustration of the last point, without coordination between different agencies of government, conflict will almost inevitably result in significant impacts.

Whatever the similarities between EA and SEA procedure, there is a need for the latter to be applied as flexibly as possible. This is because of differences in application between EA and SEA, and the contexts which underlie them in different countries. Aspects such as initiation, screening, scoping, documentation, review, decision, monitoring and participation

128 Wood and Djeddour, op cit n 6, pp 8-10.

appear in most SEA systems to a certain extent. Citing both the UNECE Task Force[129] and UK Government guidance,[130] a number of procedural matters have been highlighted as important:

- carefully screening for the most effective stage(s) at which to apply SEA;
- determining where, when and how to involve the public, or outside parties;
- ensuring that confidentiality is a legitimate reason (not an excuse) for excluding them;
- as far as possible, keeping SEA procedures short and simple;
- providing the right information at the right time;
- acknowledging that assessment is one step in a continuous process;
- monitoring or tracking a policy, plan or programme to (re)assess unforeseen modifications; and
- bringing in new information and options as required.[131]

With regard to methodology, it appears that simple approaches work best, and that not all methodologies are suitable for all types of SEA.[132] The use of a checklist to assist in the screening process is a useful first step; this can be complemented by other methods should it become clear that uncertainties are present, or the potential for cumulative impacts is great. Sustainability indicators are an illustration of a more comprehensive method (see section 1.2a).[133] They are widely supported, and their use has been described as part of an 'integrated' SEA model, which represents best practice:

> In particular, this model involves identifying the policy, plan or programme's sustainability or environmental objectives; linking these objectives to indicators; and using the indicators to test the attainment of the objectives, describe the baseline environment, make impact predictions, and monitor the effect, and effectiveness, of the PPP.[134]

Economic approaches such as cost benefit analysis (CBA) also have a role to play, especially where SEA is more integrated with policy appraisal, and tools such as matrices may be useful to evaluate planning proposals. Other methods tend to focus on the use of expert help, either from

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129 UN Economic Commission for Europe, 1992. *Application of EIA Principles to Policies, Plans and Programmes*, UNECE: Geneva.

130 UK Department of the Environment, op cit n 117.

131 Sadler and Verheem,op cit n 7, p 108.

132 SEA methodology was reviewed for the European Commission in 1994, see DHV Environment and Infrastructure, 1994. *Strategic Environmental Assessment, Existing Methodology, Commission of the European Union,* Directorate General of the Environment, Nuclear Safety and Civil Protection: Brussels.

133 For a preliminary set of indicators, see Organisation for Economic Cooperation and Development, 1991. *Environmental Indicators*, OECD: Paris.

134 Therivel and Partidario, op cit n 4, p 30. Note that this is the approach taken in compiling criteria for contextual issues in Chapter 6, in linking criteria with objectives.

recognised practitioners or central environment departments; guidance documentation and training supplements this.[135]

A comprehensive range of methods are therefore available, and these illustrate that EA methods are quite feasible, or if not, policy analysis methods may be usefully employed (see section 2.2). The difficulties are therefore far less significant than has been stated.

4.2 Timing

a. Assessment during formulation

Assessment of PPPs may take place at different stages, and this is also true of legislative proposals. In order to minimise negative impacts on the environment and to enable full consideration of need and alternatives, assessment during the formulation stage is most helpful. It is imperative that legislation is assessed during its formative stages so that all appropriate options are suitably explored. Ideally this should involve wide consultation and participation. An early commentary on NEPA referred to the 'maximum leverage points' at which environmental effects should be addressed, one of these being the legislative drafting stage:

> These points first emerge in the earliest phases of federal planning - the writing of new legislation, formulation of federal policies, design of entire federal programs, and preparation of guidelines - when environmental impacts may be avoided before prestige, time, and money are committed.[136]

Unfortunately there have been few legislative EISs under NEPA, and those produced have been largely limited to legislation with a specific environmental focus.[137]

The Canadian *Cabinet Directive* also stresses the importance of assessment at the policy formulation stage, as it 'represents the earliest (and sometimes best) opportunity to anticipate environmental problems...'[138] One of the most successful examples of application here

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135 Therivel and Partidario also link closely the methodologial and procedural stages of the process, ibid, pp 30-44.

136 Note, 1974. 'The National Environmental Policy Act: How It Is Working, How It Should Work' 4 *ELR* pp 10006-10007.

137 Of the filings with the EPA in 1994 only six legislative EIS's were lodged out of a total of 532 EIS's. One was a final legislative EIS and five were draft legislative EIS's; all were on environmental protection legislation. See Chapter 4, section 1.

138 Nicholson, op cit n 115, p 10.

was to the proposed amendments to Canada's *Western Grain Transportation Act* (WGTA).[139] Although never implemented, it is possible that a subsequent assessment would have been necessary on any draft regulations that were to follow, for the reason detailed below.

Other examples of assessment at this time are in Denmark and the Netherlands, where the *Administrative Order No 12* 1995 and *Environmental Test* respectively are to be applied during the drafting stages (see Chapter 4, section 4.1 and Chapter 8 respectively). Again the emphasis is on consideration as early as possible.

b. Assessment after drafting/enactment/implementation

If a PPP is not clearly defined, it may not be possible to assess it during formulation. In these circumstances, assessment after drafting is likely to be the most practical option. A draft legislative proposal may still be subject to amendment by the executive and legislature, and it is easier to consider screening and scoping once the proposal is in a concrete form. Although assessment after implementation is also a possibility, it may be too late at this stage to remedy any failings; in these circumstances provision should be made for continuing assessment, as the legislative amendment process is often used to overcome difficulties not originally envisaged.

The reason why subsequent assessments of draft regulations made under the WGTA would have been necessary is because the Regulatory Impact Analysis Statement (RIAS) process is applied following the drafting of subordinate legislation. This has been the case since 1986, and since 1990 the SEA provisions of the *Cabinet Directive* have required that the RIAS process take into account environmental impacts. This has resulted in a good deal of paperwork, some of which addresses environmental concerns. Whether or not it does this effectively is evaluated in Chapter 7. However if RIAS is applied following an assessment during the policy formulation stage (principal legislation), there will be less need for each impact to be assessed again at the plan, program or project level.

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139 LeBlanc, P, and Fischer, K, 1996. 'The Canadian Federal Experience' in Jaap de Boer, J, and Sadler, B, (ed), *Environmental Assessment of Policies: Briefing Papers on Experience in Selected Countries*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer, pp 27-37. Strictly speaking, the WGTA was assessed under the provisions of the *Farm Income Protection Act*, see Hazell, S, and Benevides, H, 1998. 'Federal Strategic Environmental Assessment: Towards a Legal Framework', 17 *Journal of Environmental Law and Practice*, pp 349-377.

In both Denmark and the UK, research has been carried out for the European Commission on assessing legislation retrospectively. In the first case, the Danish tenancy bill[140] and in the second the European *Less Favoured Areas Directive* were assessed after enactment but before implementation[141] (see sections 1.2 and 3.2). The authors of the UK research believe that only when legislation is in place is a policy likely to impact on the environment. However as policy is often informally implemented through plans and programs, and government policy statements often implement matters directly, this is questionable.

4.3 Law or policy framework

As noted at the beginning of this chapter, many countries have SEA provisions, although most fail to take advantage of them.[142] It is important to note however that none of those with legal provisions deal exclusively with SEA. For example the US federal (1969) and Californian[143] provision (1970) tier SEA and EA, the Netherlands provision (1987 and 1994) deals with other aspects of EA and environmental management, and New Zealand's comprehensive framework (1991) focuses on environmental management with SEA and EA integrated within.[144]

In 1992, mandatory provisions for SEA were distinguished from more discretionary environmental evaluation.[145] More recently, four major categories of law and policy illustrate the varying provisions that have developed and been implemented since:

- SEA provided for in principle in legal frameworks and also carried out formally in practice, though only occasionally...
- SEA provided for in principle but not carried out formally in practice; though it may occasionally be carried out informally...
- SEA carried out informally, that is in practice but not in principle...
- SEA not provided for either in principle or practice...[146]

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140 See Elling and Nielson, op cit n 91.

141 See Wathern et al, op cit n 20. Note that in the case of European Directives the method of implementation is at the discretion of the Member State, but not the question of whether they should be implemented.

142 Such as Australia with the *Environmental Protection (Impact of Proposals) Act* 1974, and also with regard to the Ecologically Sustainable Development criteria to be included in Cabinet policy formulation.

143 *California Environmental Quality Act* 1970.

144 For further information on these SEA requirements and those of other jurisdictions not mentioned, see Sadler and Verheem, op cit n 7, pp 73-75, and Therivel and Partidario, op cit n 4, chapter 4.

145 Lee and Walsh, op cit n 9, p 127.

146 Buckley, R, 1997. 'Strategic Environmental Assessment' 14(3) *Environmental and Planning Law Journal*, p 176.

As EA has in general adopted a legislative basis only as experience has been gained,[147] it is likely that as SEA itself matures, so further calls will be made for the certainty and transparency that the law will bring.[148] Deciding whether to legislate for SEA is closely related to the nature of the contextual frameworks that exist. Closed political systems are unlikely to be willing to legislate for greater public scrutiny of policy, whereas pluralistic countries are more likely to accept the need for it (see Chapter 5, section 2.2a).[149] It is also important to remember that 'the existence of guidelines and regulations does not guarantee effective use of SEA in practice, nor does the absence of formal SEA regulations prevent SEA practice'.[150]

Above all, a lack of political will may be cited to explain the reluctance of governments to fully implement SEA. There is inevitably concern expressed about submitting decision-making procedures to scrutiny. Part of this results from the convention of collective responsibility common to cabinet government, whereby to act in the national interest a unified front is presented and cabinet meetings are held in secret.

However there must also be significant reluctance to cede power. Whether in a democracy this less than adequate state of affairs is permitted to remain is questionable. In much the same way as there is a reluctance to be bound by legal provisions for SEA, so the difficulties discussed below of confidentiality, accountability and integration all ultimately depend on political will:

> Implementation of SEA depends on effective political will. Each political and organisational culture will have to develop the necessary administrative and institutional mechanisms to carry out an SEA system and find the most appropriate ways to ensure a certain degree of accountability of policy, planning, and program proposals, including those that are considered politically sensitive. Greater difficulties, however, are expected where more closed and rigid political systems do not adopt EA systems or allow public

147 Court, J, and Associates and Guthrie Consulting, op cit n 39, chapter 8.

148 Fowler, R, 1985. 'Legislative Bases of Environmental Impact Assessment' 2 *Environmental and Planning Law Journal* pp 200-5

149 For discussion of the advantages of a legal basis for EA and SEA in Canada, see Edmond, D, 1978. *Environmental Assessment Law in Canada*, Edmond-Montgomery: Toronto, p 217; Rolfe, C, and Gibson, R, undated. *Assessment of Policies and Programs under the Canadian Environmental Assessment Act - Recommendations for Reform*, West Coast Environmental Law Research Foundation: Vancouver; Schreker, T, 1991. '*Environmental Assessment Act*', 5 *Canadian Environmental Law Reports*, pp 192-246; and Hazell, S, 1997. 'A Legal Framework for Strategic Environmental Assessment? - The Federal Experience in Canada', *Paper presented to the IAIA Annual Conference*, New Orleans.

150 Therivel and Partidario, op cit n 4, p 29. Sadler and Verheem concur, op cit n 7, p 78.

> scrutiny as natural components in the decision-making process. In these cases, there may be no procedural or technical mechanisms that can replace political accountability and effective and flexible institutional frameworks.[151]

4.4 Confidentiality, accountability and integration

Confidentiality results from the need of government to present a united front, and constitutional concerns have often been raised in the context of collective ministerial responsibility to prevent the release of information to the public. Other concerns relate to the possibility that assessments may be open to legal challenge, although this may be overcome by incorporating informal assessments within existing decision-making procedures.

To raise the issue of confidentiality per se merely serves to strengthen public perceptions regarding secrecy and lack of accountability. There is no reason why a limited number of exemptions cannot be made to deal with concerns, where clearly the public interest would be advanced. This is the case with regard to the Canadian SEA provision which is considered in Chapter 7, where although matters of defence policy have in the past fallen into this category, budget proposals have not.

With regard to accountability, when policy-maker and assessing authority are one and the same, presumptions of bias are likely to remain an issue. Although these may in part be overcome by appointing an outside authority for independent review, at the policy formulation stage it is important that departments themselves, (and between themselves), consider the environmental consequences of various alternatives. Responsibility has to begin somewhere, and one of the foremost arguments in favour of allowing developers to prepare their own EISs is that by assessing impacts themselves, the purpose of EA may most clearly be demonstrated.

There is a need for SEA to be fully integrated into existing procedures whether they are working well or not, to ensure that they are strengthened. Many government departments do not believe another is competent to deal with issues traditionally falling within their own area of control, and

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151 Partidario, op cit n 4, p 39.

where SEA is resisted as a result of this, there has been a failure to emphasise the sustainable development message.[152]

There are many examples of such conflicts in Australia, and the Intergovernmental Agreement on the Environment (IGAE) and Council of Australian Governments (COAG) Agreement on Commonwealth/State Roles and Responsibilities for the Environment are designed to avoid them. Departments and agencies need to recognise the importance of the 'whole of government' approach, and the holistic effects of policy-making on the environment. Cooperation with one another is the best way of doing this, avoiding or mitigating impacts, and contributing to sustainable development.

152 The difference between the relative success of the Dutch *Environmental Test*, the Danish *Administrative Order* and European Commission Green Star System (considered in Chapters 7 and 8) is in part attributed to the cross-ministerial involvement in the E-Test. See Therivel and Partidario, op cit n 4, p 28.

Conclusions

The main conclusion to be drawn is that in the comparatively short period that SEA has been operational, it has shown great promise in contributing to sustainable development and improving EA (section 1.2). While there is no one definition or approach, this is an advantage, since flexibility enables greater innovation in developing procedure and methodology for different applications. It is important that adequate time is allowed for any new policy, planning and management tool to reach its full potential; while there is now some consensus regarding international best practice, there should still be scope for development following further experience.

SEA and legislative EA contribute to sustainable development by integrating environment, economy and society at the most strategic time, and they improve EA by remedying many of its problems. These include the reactive nature of the process, (whereby alternatives are commonly foreclosed), and its weak influence on decision-making. For outcomes to be substantively influenced however, it is important that decision criteria and sustainable development indicators are developed. If this is done, then potentially powerful tools such as Sustainability Assurance may illustrate their practical benefits for environmental change (section 1.2a).

For the purposes of this thesis, SEA and legislative EA demonstrate their potential to make significant improvements to matters of procedure, provided the context in which proposals are assessed is fully appreciated. The development of legislative EA from policy analysis is far removed from the context of land use planning, and it is very important that the policy process, (particularly in the formulation, drafting and assessment of legislative proposals), is well understood (section 2.1).

The difficulties raised in the literature do not prevent the successful implementation of either SEA or legislative EA. Existing procedures and methodologies may be adapted; assessment processes may be timed to coincide with current decision-making processes, (and thereby overcome concerns of confidentiality, accountability and integration); and policy/decision-makers will be more open to its use if discretion is available, either in implementing legislation, or in a policy directive (section 4). Chapter 4 considers the systems of legislative EA that have developed to date, where this flexibility is increasingly seen.

Chapter 4 – Systems of Legislative Environmental Assessment

Introduction

The purpose of this chapter is to consider examples of where SEA has been, or will be, applied to legislative proposals. The original NEPA requirement is considered, a historical overview and EA reform in Canada and the Netherlands is discussed, recent European developments are described, and Australia's new proposed provision is analysed. These countries have the only provisions for legislative EA, and illustrate its growing significance.

NEPA contained the first provision for legislative EA. The legal basis for this is outlined, and the need to tier different EIS's is described. Procedures for the legislative EIS requirement are analysed, indicating that there are two different procedures for primary legislation (bills), and secondary legislation (regulations). Finally, administrative arrangements are described, and some examples are given of proposals assessed to date.

Canada and the Netherlands are considered in the next section. As both are evaluated in detail in Chapters 7 and 8, reference to each is limited to an historical overview of the current requirements, and an examination of the EA reform measures which introduced them. Reference is made to the earlier Canadian policy provision which was little applied to SEA, and to the Dutch statutory provisions which are applied to other PPPs.

A number of European jurisdictions have, or will have, provisions for legislative EA, and these are also examined. They include Denmark, Finland, the European Commission and Norway. Each is considered briefly in its context before comparisons are drawn between each.

Finally, Australia's proposed EA statute is evaluated with reference to recommendations made in the public review process. The Bill includes an SEA provision which may be applicable to legislative EA. Related requirements in the Bill that deal with EA and the policy context are also considered, to enable the utility of the tool to be fully understood.

1. United States – *National Environmental Policy Act* 1969

The general provisions of the US *National Environmental Policy Act* 1969 (NEPA) were described briefly in Chapter 2 (see section 2.1a). The purpose of this section is to highlight the specific provisions of NEPA which relate to legislative EA. The section first considers the legal basis for the legislative EIS, before considering in more detail: the procedures that are to be followed, the role of various actors in the process, and, finally, some of the better known examples of legislative EISs produced to date.

1.1 Legal basis

NEPA has always contained a provision for legislative proposals to be assessed. Section 102(2)(C) contains the 'action-forcing' requirement, as further defined by section 1508.18(b) of the Council on Environmental Quality (CEQ) Regulations.[1] Under the former, an EIS is to be produced for '*every recommendation or report on proposals for legislation* and other major Federal actions significantly affecting the quality of the human environment' (my italics). The ordering of the section is significant, and has been largely overlooked. Most of the focus has been on the latter part, and the effect of this has been a failure to take advantage of a provision which could have had significant benefits in promoting sustainable development :

> NEPA requires that impact statements be submitted with the legislative proposals that federal agencies submit to Congress. This little-discussed requirement appears in the text of the statute before the wording upon which the courts have relied in applying NEPA to "other major federal actions," making the latter appear to be a draftsman's afterthought.[2]

There are three types of EIS that may be required under section 102(2)(C): a policy EIS,[3] a legislative EIS or a programmatic EIS,[4] and the

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1 With the exception of references to section 102(C) of NEPA, unless stated otherwise all the section numbers that follow are from the CEQ Regulations which implement NEPA; these replaced the guidelines that preceded them in 1978.

2 Anderson, F, 1973. *NEPA in the Courts*, John Hopkins University Press: Washington DC, pp 126-127.

3 The term is not used in NEPA, but it represents the highest tier of the assessment process. Policy EISs are rarely used, see Sigal, L, and Webb, J, 1989. 'The Programmatic Environmental Impact Statement: Its Purpose and Use' 11 *The Environmental Professional*, p 15.

4 For further information on the programmatic EIS, see P Barney, 1981. 'The Programmatic Environmental Impact Statement and the National Environmental Policy Act Regulations' 16 *Land and Water Law Review*, pp 1-31.

relationship between them is both close and confusing.[5] While the only definition in the Act or Regulations is of the legislative EIS,[6] a 'policy EIS' may be defined as a statement of the likely environmental impacts of planned executive action. Such policy should guide the preparation of subsequent programs or legislative proposals. A 'programmatic EIS' may be defined as a statement of the likely environmental impacts of a legislative package supported by funding.

Legislative EISs and programmatic EISs should be distinguished,[7] because although programs often have a legal basis, they tend to be implemented by subordinate legislation, whereas legislative EISs are prepared on principal legislation. Programs are therefore subject to the 'other major federal actions' section of 102(2)(C) and not to the Congressional process.[8]

If impacts are assessed fully in the policy EIS, then the need for subsequent assessment in a programmatic EIS may be reduced, (some examples are given in 1.4 below.) Known as 'tiering', this has been described as follows:

> Under this approach, the first statement prepared would cover pending legislation or broad, new federal policies; statements to follow would be prepared as each distinct initiative in implementing the legislation or policy was formulated. The later statements would cover increasingly specific programmatic initiatives and impacts, and would refer back to the broader statements for their treatment of far-ranging alternatives and basic federal policy.[9]

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5 For examples of the interplay between these different types of proposals see Edmonds, J, 1973. 'The National Environmental Policy Act Applied to Policy-Level DecisionMaking' 3 *Ecology Law Quarterly*, pp 799-842.

6 See Fisher, M, 1973. 'The CEQ Regulations: New Stage in the Evolution of NEPA' 3 *Harvard Environmental Law Review* pp 368-369; for examples of early regulations assessed see Edmonds, ibid, appendix B, and Sigal and Webb op cit n 3, p 21.

7 See Sigal and Webb, op cit n 3, and Legore, S, 1994. 'Experience with EIA Procedures in the USA' in Roberts, R, and Roberts, T, (ed), *Planning and Ecology*, Chapman and Hall: London, where the examples of the *Clean Water Act*, the *Resource Conservation and Recovery Act*, the *Coastal Zone Management Act*, and the *Power Plant and Industrial Fuel Use Act* are cited. For a recent example of a programmatic EIS, see Fish and Wildlife Service, Department of the Interior, Notice of Intention to Prepare a Programmatic EIS for the Application of the Coastal Barrier Resources Act to the Pacific Coast (*Federal Register*, Feb 8, 1995).

8 The scope of the programmatic EIS has largely been determined by the courts, see *Scientists' Institute for Public Information Inc v Atomic Energy Commission* 481 F2d 1079 (US DC 1973), *Indian Lookout v Volpe* 484 F2d 11 (8th Cir. 1973), and *Cady v Morton* 527 F2d 786 (9th Cir. 1975).

9 Note, 1974. 'The National Environmental Policy Act: How it is Working, How it Should Work' 4 ELR, p 10007.

1.2 Procedures

Section 1508.17 of the CEQ Regulations defines 'legislation'.[10] The distinction between principal and subordinate legislation under NEPA is significant, as there are different procedures for each of these. Section 1506.8 (below) sets out the procedure to be followed in Congress with regard to the assessment of principal legislation; section 1508.18(b) sets out the procedure to be followed by the departments and agencies in general,[11] which includes the assessment of subordinate legislation.[12]

> **Sec. 1506.8 Proposals for Legislation.**
>
> (a) The NEPA process for proposals for legislation (Sec. 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as a basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

In the same way that it is appropriate to combine EISs of land use plans with the general planning process, so combining the legislative EIS process with the Congressional process is appropriate because it integrates and coordinates two related processes. While the EIS will be just one factor to be considered in the decision-making or policy implementation process, a consideration of the EIS within these contexts should hopefully produce better informed decisions and policies.

There is no requirement for a scoping process under section 1506.8(b). While the EIS is to be prepared in the same manner as a draft statement under NEPA, it will be considered the 'detailed statement'. There are however, four circumstances under which a final EIS may also be necessary. These are: a requirement by a Congressional committee for both, a requirement for a study process under another statute,[13] where

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10 This indicates that the agency with primary responsibility for the subject matter is required to prepare the legislative EIS.

11 An example of regulations being assessed in a programmatic EIS was the migratory bird hunting regulations affecting hunting on refuges across the US. See Mangun, W, 1988. 'Impact Assessment for Federal Wildlife Policy' 6 *Impact Assessment Bulletin* pp 84-85.

12 See generally, Asimov, M, 1983. 'Delegated Legislation: the US and the UK' 3(2) *Oxford Journal of Legal Studies*, pp 253-276.

13 Such as the *Wild and Scenic Rivers Act* (16 USC 1271 et seq) and the *Wilderness Act* (16 USC 1131 et seq).

legislative approval is sought for federal/federally assisted construction or other projects in a specific location, and where the agency itself decides to prepare draft and final statements.[14]

Ultimately however, failures of implementation have undermined the legislative EIS requirement, and more attention has been focused on subordinate legislation.[15] An opportunity may been missed, and the Congress is most likely to blame:

> The principal responsibility for relaxing the legislative EIS requirement... must rest with the Congress... Properly drawn legislative impact statements fulfil splendidly the NEPA objectives of prediction, prevention, and before-the-fact analysis...[16]

Despite the prominence attached to 'proposals for legislation' therefore, most proposals (including programs), are assessed as subordinate legislation under the 'other major Federal actions' subsection.[17] The intent of Congress in enacting NEPA was rather that the assessment of principal legislation would be emphasised, because it represented a 'maximum leverage point'.

1.3 Administration

In the absence of Congressional commitment, four institutions have been involved in a limited way with the implementation of the legislative EIS requirement: the Office of Management and Budget (OMB), the Environmental Protection Agency (EPA), the Council on Environmental Quality (CEQ), and the courts.

Under section 1500.12 of the CEQ Regulations, the OMB was originally responsible for checking that any EIS prepared on legislative proposals complied with the requirements. However it proved notably reluctant to take up this task,[18] so under section 309 (a) and (c) of the *Clean Air Act,* the EPA was given the task of reviewing and making written comments

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14 See 43 FR 55990 Sec. 1502.9 for the general procedure regarding 'Draft, final, and supplemental statements.'

15 Op cit n 2, p 126.

16 Rodgers, W, 1978. *Environmental Law*, West Publishing: St Paul, p 714. For further detail, see Liroff, R, 1976. *A National Policy for the Environment*, Indiana University Press: Bloomington.

17 Sigal and Webb, op cit n 3, pp 14 and 17. Despite this error, the authors do recognise that legislative proposals are subject to a separate process, see p 22.

18 Liroff, op cit n 16, pp 123-125.

upon the environmental impacts of proposed principal or subordinate legislation. These comments are to be made public at the end of the review, and afterwards decisions are to be taken on the proposal and the adequacy of the EIS. If it is concluded that environmental quality will be adversely affected, the matter is to be referred to the CEQ for further action.[19]

Finally, the courts play a crucial role in the enforcement of NEPA. Court actions have in general been concerned with the failure of an agency to produce an EIS, or have been challenges to the adequacy of those produced.[20] However although it may be possible for the courts to require an agency to produce a legislative EIS, it is not believed to be possible to prevent Congress from considering a bill which is not accompanied by one.[21] This is because of the separation of powers between the executive, legislature and judiciary, and the ability of the Congress (as the law-making body) to exercise its powers unhindered. Provided it acts within the constitution therefore (which it would be in this instance), the court would have no right of intervention.

1.4 Examples of proposals assessed

The most well known example of a legislative EIS is the documentation produced on the Trans-Alaska Pipeline.[22] This concerned plans to transport oil from Prudhoe Bay on the coast of the Beaufort Sea south to the Gulf of Alaska for shipping to the mainland United States. Significant environmental impacts were likely from constructing the pipeline over permafrost (whereby cracking would occur during the summer thaw), and impacts upon migratory animal species such as caribou were also likely to be detrimental. In addition, impacts were likely upon the native peoples of

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19 United Nations Economic Commission for Europe, 1991. *Policies and Systems of EIA*, United Nations: New York, p 14. Again however neither the EPA nor CEQ have been interested in enforcing these provisions.

20 This role is well documented; see S Fairfax and H Ingram, 1981. 'The US Experience' in O'Riordan, T and Sewell, D, (ed) *Project Appraisal and Policy Review*, Wiley and Sons: Chichester, p 35; Wenner, L, 1990. 'Environmental Policy in the Courts', in Vig, N, and Kraft, M, (ed), *Environmental Policy in the 1990's: Toward a New Agenda*, Congressional Quarterly Press: Washington DC, 1990), pp 189-206; and Anderson, op cit n 2.

21 See Rodgers, op cit n 16, p 714. But see also the view of the Environmental Law Institute, *Federal Environmental Law*, p 332.

22 US Fish and Wildlife Service, 1987. *Arctic National Wildlife Refuge, Alaska Coastal Plain Resource Assessment: Report and Recommendation to the Congress of the United States and final legislative environmental impact statement*, US Government Printing Office: Washington DC. For background see Journal Notes, 1972. 'Evolving Judicial Standards under the National Environmental Policy Act and the Challenge of the Alaska Pipeline', 51 *Yale LJ.*

the north, with large numbers of workers transported from the south having negative effects upon traditional cultures. More recent examples of legislative EISs include those prepared under the *Wild and Scenic Rivers Act,* such as the drafts for the Arizona Statewide Designation, and the Bridger-Teton National Forest Study.[23]

The Proposed Resource Strategy is an example of how both policy and legislative EISs may be required, but not programmatic EISs.[24] Under the Strategy, decisions were to be made on broad strategies to achieve energy goals such as conservation, and the use of existing abundant resources and the development of new ones:

> At this level, these actions may be proposals for legislation or formal statements of national energy policy. For legislative proposals, the need for environmental documents is evaluated during policy formulation, and any required documentation accompanies the submittal of a proposal to Congress (40 CFR 1506.8). For statements of energy policy that will result in or substantially alter DOE programs, environmental documentation is developed during the analysis phase of policy development and published in advance of policy adoption.[25]

By contrast, the Transmission Facilities Vegetation Management Program,[26] (which formed another tier of the Resource Strategy), was clearly suitable for a programmatic EIS, as it was to be implemented by regulations:

> ...decisions are to be made on implementing specific policies or statutory authorities such as the advancement of energy technology programs, or adoption of a program plan... For programs that are implemented by regulations, NEPA documentation is to be initiated during early regulation drafting stages, and any required draft NEPA documents are published along with formal regulations.[27]

2. Canada – *Cabinet Directive on the Environmental Assessment of Policy and Program Proposals* 1990

The system of legislative EA operating in Canada is considered in detail in Chapter 7. As such, this section is limited to an overview of the

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23 See listings 940109L BLM, *Arizona Statewide Wild and Scenic Rivers Designation, Legislative Draft,* AZ, and 940298L AFS, *Bridger-Teton National Forest Wild and Scenic River Study, Legislative Draft,* WY: US Environmental Protection Agency, 'Summary of Environmental Impact Statements', from *EIS Activity: Calendar* 1999, (NEPAnet:http://ceq.eh.doe.gov/nepa/nepanet.htm).

24 EIS-0130 of 1988.

25 Op cit n 3, p 23.

26 EIS-0097.

27 Op cit n 3, p 22.

introduction of the process and a discussion of the EA reform measures which led to the Directive. It will provide the historical context for an evaluation of the legislative EA process, setting the scene for further discussion.

2.1 Historical overview

Canada was one of the first countries to implement EA following NEPA in the US; and interest in SEA and legislative EA may be traced to the early 1970's. In 1972 the Federal Task Force on Environmental Impact Policy and Procedure highlighted deficiencies of limiting the proposed EA process to projects, and recommended that it also be applied to PPPs and legislative proposals:

> This project-by-project approach is not adequate to solve the problem of environmental impact. There is also the need to assess other types of actions, which the Task Force has identified as policies, programs, legislative proposals and operational practices. This need is not generally recognized.[28]

The *Environmental Assessment Review Process* (EARP) was implemented by Cabinet decision in 1973. The *Government Organization Act* 1979 authorised the Minister of the Environment to develop guidelines to assist departments and agencies carry out their assessment responsibilities; this was later to be used to formalise EARP by the *Guidelines Order* of 1984,[29] which established its procedural basis.[30] EARP was criticised during its history for many reasons. Some of these include: the lack of a legislative basis or strong institutional arrangements, the failure to guarantee public participation, the lack of clarity and

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28 Environment Canada, 1972. *Final Report of the Federal Task Force on Environmental Impact Policy and Procedure*, p 5. Environment Canada reaffirmed this belief in 1984, when it made explicit reference to SEA in requiring that 'The environmental impact of federal government policies, programs and activities must be assessed at an early stage in the planning process and the results made public.' See Environment Canada, 1984. Sustainable Development - A submission to the Royal Commission on the Economic Union and Development Prospects for Canada, Environment Canada; principle five, p 16.

29 *Environmental Assessment and Review Process Guidelines Order*, 188 Can.Gaz. 2794 (Nov 7, 1984).

30 Canada was also one of the first countries to take up the sustainable development challenge following Brundtland; yet despite the early impetus given to sustainable development by the Green Plan of 1990, there was little recognition in government circles of the link between sustainable development and environmental policy tools such as EA. EARP and its Guidelines Order were largely introduced in a policy vacuum, and it was only the more recent processes of the *Cabinet Directive for the Environmental Assessment of Policy and Program Proposals* 1990 and the *Canadian Environmental Assessment Act* of 1995 (announced at the same time), that drew the link between EA and sustainable development.

consistency in application, and inadequate political will. In addition, it was criticised for its limited application to projects.[31]

Although most of the time only projects were assessed, it is arguable that EARP had always applied to PPPs. Section 2 of the Guidelines Order required that EA be applied 'as early in the planning process as possible and before irrevocable decisions are taken', and section 3 cites the need for the environmental implications of 'all proposals' to be assessed. Cerny and Sheate give examples of where the *Guidelines Order* was applied to a small number of PPPs.[32] However application was less than consistent, and many policies with important environmental consequences (such as cuts in passenger rail services), were not subject to EA under EARP.

The Mackenzie Valley Pipeline Inquiry[33] and the Beaufort Sea EA Panel[34] were perhaps the most notable of the public reviews which considered policy matters extensively. However many other policy issues could also have been more effectively dealt with under EARP if political will had been present. Bridgewater points to policy matters being of relevance to thirty two EAs conducted under EARP, the majority which were the direct result of transport and energy policies.[35]

Until 1990 when a formal requirement for SEA was introduced, it was therefore largely left to academics and practitioners to illustrate the benefits that could be obtained from applying SEA. Much of this interest came from its potential contribution to sustainable development (see Chapter 3, section 1.2a).[36] As momentum grew for changes to the federal EA process in the late 1980's, a number of papers were published indicating the links between EA and sustainable development, some of

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31 Graham Smith, L. 1991. 'Canada's Changing Impact Assessment Provisions', 11 *Environnmental Impact Assessment Review*, p 8.

32 Cerny, R, and Sheate, W, 1992. 'Strategic Environmental Assessment: Amending the EA Directive' 22/3 *Environmental Policy and Law*, p 157.

33 Berger, T, 1988. *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*, Douglas and McIntyre: Vancouver/Toronto.

34 Sadler, B, 1990. *An Evaluation of the Beaufort Sea EA Panel Review*, FEARO.

35 Bridgewater, G, 1989. *Environmental Impact Assessment of Policies in Canada: A Beginning*, International Association for Impact Assessment/Canadian Environmental Assessment Research Council: Montreal.

36 See for instance Rees, W, 1988. 'A role for environmental assessment in achieving sustainable development' 8 *Environmental Impact Assessment Review*, pp 273-291, Gardner, J, 1989. 'Decision-making for sustainable development: selected approaches to environmental assessment and management' 9 *Environmental Impact Assessment Review*, pp 337-366, and Jacobs, P, and Sadler, B, 1989. *Sustainable Development and Environmental Assessment: Perspectives on Planning for a Common Future*, Canadian Environmental Assessment Research Council Background Paper.

which indicated that sustainable development was likely to be furthered more if EA was applied to PPPs and legislative proposals.

2.2 EA reform

A preliminary pilot study was commissioned in 1986 to identify key issues in the reform process, in part as a result of the criticisms levelled at the uncertainties of the application of EARP.[37] A consultation workshop organised by the Federal Environmental Assessment Review Office (FEARO) in 1988 made a number of proposals for reform. In 1989 the Federal Court of Canada ruled in the Rafferty-Alameda case that the *EARP Guidelines Order* bound the Government to assess all of its activities, including PPPs.[38] The court decision was responsible for speeding up the drafting of legislative and policy measures to introduce certainty in federal EA procedures.[39] These were announced the following year by the Government, and would abolish EARP and replace it with the *Canadian Environmental Assessment Act* (the 'Act') and the *Cabinet Directive on the Environmental Assessment of Policy and Program Proposals.*

The Act was tabled in the House of Commons soon thereafter, but a change in Government meant it would not come into force until 1995. It defined proposals very narrowly, 'in relation to any physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work'. The Directive was applicable immediately, and SEA would be implemented by it. In parallel with EARP, it was not given a legal basis and procedures were introduced later.[40] The Directive did bring some certainty however, as it was clear that major federal government policies were now subject to EA,[41] and this included specific provision for legislative proposals.[42]

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37 Bregha, F, Bendickson, J, Gamble, D, Shillington, T, and Weick, E, The Rawson Academy of Aquatic Science, 1990, Background Paper, Executive Summary, *The Integration of Environmental Considerations in Government Policy*, Canadian Environmental Assessment Research Council.

38 See Hunt, C, 1990. 'A Note on Environmental Impact Assessment in Canada', 20 *Environmental Law*, p 806.

39 *Canadian Wildlife Federation v Minister of the Environment* 4 WWR 526 (FCTD 1989).

40 Many have criticised the absence of a legal basis for SEA. See Schreker, T. 1991. 'Environmental Assessment Act', 5 *Canadian Environmental Law News*, pp 224-228.

41 Sadler, B, 1995. 'Canadian Experience with EA: Recent Changes in Process and Practice' 2(2) *Australian Journal of Environmental Management*, pp 112-130.

Three main reasons have been put forward by Doern as to why the Government felt that a legislative basis for SEA was undesirable. The first is that many ministers and departments resent interference with their policy-making independence and exercise of discretion. The second is that departments such as Finance and Industry are concerned more about economic priorities, and do not feel that these should be compromised by an obligation to consider environmental issues. The third is that the Privy Council Office (PCO) believes that legislation should not be used to compel ministers to take certain matters into account in decision-making.[43]

A number of initiatives contributed to the development of the federal procedures that were released in the Blue Book in 1993. These include: the work undertaken by the Canadian Environmental Assessment Review Council (CEARC), including the publication of a background paper of SEA;[44] the work of FEARO and the Interdepartmental Working Group on Policy EA which released preliminary guidance on the SEA process;[45] and the outcome of two binational workshops, the first in Canada in 1989 and the second in the Netherlands in 1992, which were convened as part of the Agreement on Environmental Collaboration between the two countries.[46] Despite these developments, many have been sceptical of the Government's motivation by introducing SEA under the Directive. Scott comments:

> This relatively unstructured approach which leaves policy and program assessment outside of the proposed legal framework is likely an attempt to reconcile the public's demand for assessment with the resistance which the idea of policy assessment has been met within the bureaucracy and amongst politicians.[47]

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42 Federal Environmental Assessment Review Office, 1993. *The Environmental Assessment Process for Policy and Program Proposals*, FEARO, pp 7.1 and 7.2 – known as the 'Blue Book' for the colour of its cover.

43 Doern, B. 1991. 'Social Regulation and Environmental-Economic Reconciliation' in Doern, B, and Bryne, B, (ed), *Canada at Risk? Canadian Public Policy in the 1990s*, Policy Study Number 13, CD Howe Institute: Toronto. See also the earlier discussion regarding the merits of a legal basis vis a vis policy basis for the introduction of SEA – Chapter 3 section 4.3

44 Op cit n 37.

45 Nicholson, J, 1992. *EA in Policy and Program Planning: A Sourcebook*, FEARO.

46 Dutch/Canadian workshops, Montebello 1989 and Noordwijk 1992; Memorandum of Understanding of the Ministries of Environment of Canada and the Netherlands 1988.

47 Scott, S, 1992. *Environmental Considerations in Decision Making: A Role for EIA at the Policy Level?* MES Thesis, Dalhousie University: Halifax, pp 71-72.

3. The Netherlands – *Environmental Test* 1995

This section considers the Dutch legislative EA process in the context of measures for EA reform. A historical overview of the Dutch EA system is presented, which illustrates the development of SEA in the Netherlands. Chapter 8 evaluates the E-test in depth, and this section will set the scene for the discussion and analysis there.

3.1 Historical overview

The Dutch EA system is widely regarded as the strongest in Europe, and one of the strongest globally. It was developed with particular reference to EA in Canada (see Chapter 7), and a number of pilot studies were undertaken in advance of the first procedural requirements. These were introduced by the *Environmental Protection (General Provisions) Act* 1987 and the *Environmental Impact Assessment Decree* 1987. By this time, considerable experience had been gained, and the political will was present to ensure that the requirements were significantly more rigorous than those of the European EA Directive. This was also being developed at this time, and was to be implemented by the Act and Decree.[48]

There are a number of significant features of the EA system, which have been well documented elsewhere.[49] One of these is the application of EA to PPPs, as there are additional SEA requirements (to the E-test) contained within the Dutch system for SEA. As in other jurisdictions, the Netherlands is aware of the difficulties of applying EA to policy-making (see Chapter 3, section 4). This was highlighted by the EIA Commission, which is primarily concerned with the scoping and review phases of EA in the Netherlands. The Commission has stated that a different approach was needed for SEA, particularly with regard to: the description of the proposal, alternatives, and impacts upon the environment.[50]

However following recent evaluations, three key aspects were emphasised as important for EA: selectivity regarding the need for assessment,

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48 Ratelband, J, 1990. 'Review of the European EIA Directive's Implementation in the Netherlands' in Commission on Environmental Policy, Law and Administration, *Review of the European Environmental Impact Assessment Directive's Implementation in the EEC Member States*, IUCN.

49 See Wood, C, 1996. 'EIA in the Netherlands: A Comparative Assessment' in EIA Commission, *EIA in the Netherlands: Experiences and Views Presented by and to the Commission for EIA*, EIA Commission: Utrecht, pp 3-16.

50 EIA Commission, 1991. *Annual Report*, p 7.

flexibility concerning the application of procedures, and procedural streamlining with related requirements. All of these are also relevant for SEA and legislative EA, and indicate that, perhaps surprisingly, EA and SEA may well have more in common than many realise.[51]

Provisions for SEA in the Netherlands were formerly contained within the *Environmental Protection (General Provisions) Act* 1987. Today they are found in the *Environmental Management Act* 1993-1996 (EMA), and under the requirements of the Environmental Test (E-test); the former is applicable to both PPPs and projects, and the latter to legislative proposals (see section 3.2 below).[52] In 1993 the EMA consolidated the requirements under the 1987 Act, and in 1994 and 1996 replaced them. It therefore includes requirements for the EIS (ss 7.9-7.11), describes its preparation (ss 7.12-7.16), and includes requirements for its evaluation (ss 7.17-7.26). The EMA also contains wide-ranging provisions in the area of environmental management.

The EMA is supplemented by the *Environmental Impact Assessment Decree* 1994, which replaced earlier Decrees in 1987 and 1992. This contains lists of proposals (whether projects or PPPs) which are required to be assessed in accord with procedures of the EMA. EA and SEA are triggered if a proposal appears on the list contained within the Decree, which makes it clear to everyone concerned whether an assessment is required or not. A number of policy matters are listed in the 1994 Decree; these are to be assessed when locational factors are relevant for individual projects. Van Eck comments on the requirement for SEA in the original Act and Decree:

> According to the Act that was adopted in 1987, EIA has to be carried out for decision making about activities and plans with possible severe detrimental consequences for the environment. These activities and policy plans are

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51 Luyben, M, and van Kempen, A, 1998. EIA Developments in the Netherlands, *Notes for the Annual Conference of the International Association for Impact Assessment*, pre-conference workshop, Christchurch.

52 Provisions for SEA are contained alongside those for EA in the *Environmental Management Act* and implementing Decree. These are limited in scope however, and the application of SEA to legislative proposals under the Environmental Test is completely separate. For the difference, see Sadler, B, and Verheem, R, 1996. *Strategic Environmental Assessment: Status, Challenges and Future Directions*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer, pp 70 and 98; see also Tonk, J, and Verheem, R, 1998. 'Integrating the environment in strategic decision making: one concept, multiple forms', *Paper presented to the Annual Conference of the International Association for Impact Assessment*, Christchurch. For detail on the application of the Decree to policy matters, see papers by Huisman, H, 1989. 'Application of EIA to Policies and Programs: the Case of Provincial Waste Management Plans', Canada/The Netherlands Workshop on EIA, Montebello; Verheem, R, 1994. 'SEA of the Dutch Ten Year Programme on Waste Management' *IAIA Conference Paper*, Quebec City; and ten Holder, V, 1995. 'EIA at the Strategic Level in The Netherlands', *Annual Conference on EIA*, Leeds.

specified in a positive list with threshold values published in a General Administrative Order related to the Act.[53]

These requirements continue in slightly different form under the 1994 Decree. In Category C, the following are potentially to be assessed: land development (C.9.1 to 9.3), house construction (C.11), supplies of drinking and industrial water (C.15.1 to 15.3), waste disposal (C.18.1 to 18.3), industrial estates (C.20.1) and electricity generation (C.22.1 to 22.7). This is because the majority relate to the adoption of plans of various kinds, and if location choices are required to be made, issues of policy choice arise.

3.2 EA reform

The first National Environmental Policy Plan (NEPP 1) stated that any proposals with potential for environmental impact should be accompanied by a statement of effects, giving added government commitment to SEA. Action A 141 of NEPP 1 required existing policies to be screened and assessed for their contribution to sustainable development, and methodologies were developed subsequently which could be utilised to assess proposed policies. However the requirement in NEPP 1 was not obligatory, and it was left to departments to recognise the potential of using Action A 141 to coordinate and integrate policy-making.

In the areas of physical planning, housing, technology, markets and prices, energy, transport, fiscal policy, agriculture, justice/enforcement, science, education and industry, departments were encouraged to report to parliament on how their existing policies contributed towards sustainable development. The Ministry of Environment was responsible for coordinating the initiative, with policies to be screened and scoped against a checklist of indicators and by a series of questions. Both were designed as useful tools to operationalise sustainable development, and are set out as Tables 4.1 and 4.2 below.

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53 van Eck, M, 1994. 'EIA for Policy Plans and Programmes in the Netherlands' in EIA Commission, *EIA - Methodology in the Netherlands: Views of the Commission for EIA*, MER, p 73.

Table 4.1: Checklist of Sustainable Development Indicators for Existing Dutch Policies (based on Burger, 1992)

A	energy consumption (for instance, natural gas, oil, coal);
B	quality of production processes and technologies used;
C	quality of products produced;
D	use of renewable natural resources and raw materials (such as timber, fish);
E	quantity and quality of waste flows and emissions to air, soil and water;
F	use of open space and impact on its existing use;
G	use of non-renewable resources and raw materials (such as sand, clay, marl, groundwater and springwater). [54]

Each of these matters were regarded as key aspects for sustainable development, and if any of them were a feature of an existing policy, then it was to be examined in more detail by answering the following questions:

Table 4.2: Criteria for Existing Dutch Policies (based on Burger, 1992)

- Have environmental policy goals been taken into account?
- Can environmental interests be taken into account in the implementation of the policy?
- What are the intended and non-intended (side) effects of the use of the instrument on the activities and the behaviour of the target groups?
- Do the intended effects lead to the re-use of raw materials, waste prevention and recycling, restriction of mobility, energy saving and the use of sustainable energy?

Using a list in this way is recommended for the certainty that it brings, as proponent, public and assessing authority are clear as to its application. It is an example of best practice, (see Chapter 2, section 2.1d), that was later to be adopted in the screening and scoping phase of the E-test itself (see Chapter 8 below).

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54 The EIA Commission has also been involved in operationalising sustainable development for the purpose of EA, with reference to the ecological system, the socio-economic system, and the institutional system. See EIA Commission, *Annual Report of the EIA* Commission in Support of Dutch Development Cooperation, 1993-1995, p 9.

All relevant instruments within the same policy area were to be assessed in this way so that conclusions could be reached on the cumulative effect of them all on sustainable development. Recommendations could then be made for the purpose of drafting new proposals which would ideally overcome any of the problems identified. The experience with screening and scoping of existing policy was therefore designed to help with developing methodology for the proposed E-test, although the E-test was introduced before experience could be gained.[55]

In 1990 the Evaluation Committee on the *Environmental Protection (General Provisions) Act* concluded that EA had only been applied to a limited extent to policy matters, and recommended that an environmental section be made compulsory for policy plans with potentially significant environmental impacts. In 1992 an Advisory Commission was established to consider whether a requirement for an E-test should be introduced.[56] It concluded that the advantage of the approach was that it would enable the environment to be routinely considered in the development of government policy.

The intention from the beginning was that the E-test would operate independently from the other EA and SEA provisions contained within the EMA.[57] The initiating ministry would prepare an Environmental Paragraph to accompany cabinet submissions, and it was suggested that an Environmental Review Commission could be established to consider them. This would consist of ministerial representatives, one or more independent experts, and an independent chairman. All proposals requiring a cabinet decision would be recommended for screening: on the basis of the substance of the proposal, the likelihood of environmental consequences, and the type of information required to assess them.

The government sought a pragmatic approach, and recommendations drew on the limited experience gained with the application of SEA to existing policies. A general criterion was again the extent to which relevant environmental policy goals were attained as a result of the proposal. To

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55 See Burger, B, 1992. 'The Environmental Assessment of Existing Policy Areas', in *Proceedings of the Netherlands/Canada Workshop on Environmental Impact Assessment*, Ministry of Housing, Physical Planning and Environment.

56 For background, see Verheem, R, 1992. 'Environmental Assessment at the Strategic Level in The Netherlands', 7(3) *Project Appraisal* pp 150-156.

57 The latter of which make provision for the assessment of certain PPPs in the same statutory provision as for project proposals; see the *Environmental Management Act* 1996.

contribute to these goals, it was recognised that information should be made available early on, and that as a result of the application of the E-test the environment would be given sufficient weight in decision making. The use of existing procedures was also recognised as the most effective way to ensure integration (see Chapter 3, section 4.1):

> The application of the E-test and the use of the section on the environment should be linked to existing formal decision making procedures (e.g. preparation of legislation) or integrated in informal planning processes.[58]

In 1993 NEPP 2 introduced Action A142, an obligatory requirement for an environmental paragraph to accompany new policy proposals, whenever they may involve major consequences for the environment, and in 1995 this was emphasised once more in a letter from the Minister of Housing, Spatial Planning and the Environment.[59] The requirement for the E-test in NEPP 2 was therefore different from that in NEPP 1, as its requirements now had legal force. NEPP 2 was the first NSDS prepared under the EMA (see Chapter 8, section 1.2b).

In 1994 momentum for the E-test came from a different direction, and resulted in the application of the E-test being limited to legislative proposals. An announcement was made of a project by the new Cabinet on the quality of regulation, known as the Market Function, Deregulation and Quality of Legislation Initiative (MDQ). The intention was to introduce tighter evaluations of proposed legislation, to further a more productive economy and effective administration.[60] A Ministerial Commission was established for this purpose; chaired by the Prime Minister, it was required to both review existing legislation and considers draft legislation. Both environmental and economic impacts of legislation were to be integrated, with coordination between the proposed E-test and Business Effects Test (BET, see Chapter 8, section 2.1b).

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58 See van der Lee, R, 1992. 'The environmental test for policy proposals' *Proceedings of the Netherlands - Canada Workshop on Environmental Impact Assessment*, p 149.

59 Joint Support Centre for Draft Regulations, undated. *The Environmental Assessment of Policies, Information Sheet.*

60 The momentum of regulatory reform has been a common undercurrent for legislative EA elsewhere (see Chapter 3, section 2.2b). Although not a major aspect of this thesis, there is potential to compare the influence of regulatory reform and SEA upon legislative EA further. With regard to its influence in the Netherlands see Formsma, S, 1997. 'The Dutch approach: carrot and stick', *Paper for the 'Quality of European and National Legislation and the Internal Market' Conference, Session III: Assessment of Draft Legislation*, The Hague, pp 1-3, where the concerns of overregulation upon governments in the Netherlands and elsewhere are described.

4. Recent European examples

The purpose of this final section is to consider and briefly compare a number of recent examples of legislative EA in Europe. Aside from NEPA in the US and the Canadian and Dutch provisions, these are the only detailed requirements for legislative EA that are known to exist.[61] They are all in various stages of development, and indicate the diversity of approaches being taken.

4.1 Denmark – *Administrative Order No 31* 1993

Environmental protection in Denmark is an important concern, and coordination of environmental policy is emphasised by the government.[62] Following the 1987 UN World Commission on Environment and Development, a number of action plans were prepared,[63] and membership of the EU has required implementation of the EA Directive.[64] The *Planning Act 1992* confirmed that sustainable development was a key objective of the new Ministry of Planning.[65] State of the Environment Report's are also to be prepared and integrated with policy planning.[66] Such measures set a framework for legislative EA as:

> ... it will be possible... to use existing action plans or programmes containing fixed environmental policy objectives as a reference framework for the assessment of a bill's environmental impact, since it will be possible to assess the extent to which the bills will be able to make a positive or negative contribution towards achieving the defined environmental objective.[67]

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61 There are also more recent processes in Hungary and the Slovak Republic which have merited recent attention; see Therivel, R, 1997. 'Strategic Environmental Assessment of Policies in Europe', in Harvey, N, and McCarthy, M, (ed), *EIA for the 21st Century: Conference Proceedings*, Mawson Graduate Centre for Environmental Studies: Adelaide, p 26. Note also the Australian requirements with regard to the cabinet process, (see section 5 below).

62 See Ministry of the Environment, 1992. *Environmental Initiatives in the 1990's: Objectives, Principles and Main Strategies*, Ministry of the Environment: Copenhagen.

63 See Gilpin, A, 1995. *Environmental Impact Assessment: Cutting Edge for the Twenty-First Century*, Cambridge University Press: Cambridge, p 104.

64 European Commission, Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, (OJ No L 175, 5.7.85).

65 Section 1, *Planning Act* 1992. See Ministry of the Environment, 1992. National Agency for Physical Planning, *The 1992 Planning Act in Denmark*, Copenhagen, and Ministry of Planning, Spatial Planning Department, Spatial Planning in Denmark, Copenhagen.

66 See Clement, K, 1992. 'Environmental Policy in Denmark: Strategies for the 1990's' 2(5) *European Environment*, pp 19-20.

67 Elling, B, and Nielson, J, 1996. *Environmental Assessment of Policies: PHASE 1*, Centre for Environmental Studies, Department of Environment, Technology and Social Studies, Roskilde University Centre: Roskilde, p 12.

The Danish government recognises that all sectors have potential for impact upon the environment, and to plan and manage for these an Observation and Initiative Group was established with the task of coordinating environmental policy.[68] An important part of Danish environmental policy are the legislative EA procedures contained within an Administrative Order; these require the application of environmental assessment to 'bills and other government proposals'.[69]

The Order was based on a Proposal for a Parliamentary Decision on Calculation of Environmental Impacts of Bills,[70] and a White Paper presented by an ad hoc Committee on Economic and Environmental Impacts of Public Regulation.[71] This resulted in *Administrative Order No. 31* 1993, (later replaced by *Administrative Order No. 12* 1995), the most important aspect of which is its flexibility. Although it can be criticised for the discretion that flows from this,[72] there are two main advantages: to keep the process simple as a start, and to gradually develop the context and procedure.[73] The Danish Ministry of the Environment and Energy sets out the objective of the process as follows:

> The provisions of the Administrative Order (are) supportive of the general trend towards integrating environmental considerations in planning and decision-making processes. The aim of this is to support the goal of sustainable development... Consequently, this is consistent with the need and trend at the international level to apply the principles of environmental assessment to policy, plan and programme proposals or what is known as strategic environmental assessment.[74]

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68 Clement, op cit n 66, p 19, and Ministry of the Environment, op cit n 62.

69 Government of Denmark, *Administrative Order No 12* 1995. This is not applicable to subordinate legislation when this takes the form of Statutory Orders. These are made by the Minister responsible and should follow the principal legislation they are made under.

70 B72 of 27.2.92.

71 Itself based on Report No. 1243, 1992; see The Ministry of Finance, *'The effects of public regulations for business, industry and the environment'*. Note also that on 23 June 1993, the Folketing (Parliamentary) Committee on the Environment and Physical Planning delivered a report on B69, a *'Motion for a Parliamentary Resolution Concerning Strengthening Environmental Planning and Priorities* (The Ecological Perspective)'.

72 Elling, B, 1994. 'Research on SEA in Denmark' in Morel, S, Verheem, R, and Lee, N, *EIA Methodology and Research: Third EU Workshop on EIA*, European Commission: Delphi, p 61.

73 Wulff, H, 'SEA of Policies in Denmark' in Morel, S, et al Ibid, p 59, and Johansen, G, 1996. 'The Danish Experience: The Perspective of the Ministry of the Environment' in Jaap de Boer, J, and Sadler, B, (ed), *Environmental Assessment of Policies: Briefing Papers on Experience in Selected Countries*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer, p 49.

74 Ministry of Environment and Energy, 1995. *Guidance on Procedures for Environmental Assessment of Bills and Other Government Proposals*, Ministry of Environment and Energy: Copenhagen, pp 3-4; See Appendix 1.

The Administrative Order is applied to principal legislation in Denmark, which is of three types. The first lay down rules of a 'physical or economic nature for the regulation of behaviour', or are laws which 'will have behavioural effects of a physical or economic nature'; the second 'initiate or approve specific activities, such as project-oriented laws or construction laws'; and the third are laws of a 'purely administrative nature'.[75] Only the first two have potential for environmental impact, and this is so whether their intention is environmental protection or not. Of these, only the first type are assessed under the Administrative Order.[76]

A number of guidance documents were issued by the Ministry of the Environment following the Order.[77] These recommend a broad interpretation of environmental factors, and stress the importance of assessing a range of impacts.[78] An initial screening checklist is used to determine whether any significant impacts are likely to arise. If there are any, then a full assessment takes place based on a number of sub-questions; if there are none, then this is to be stated in the documentation accompanying the bill. This procedure is illustrated below in Figure 4.1, which indicates the four principal stages involved. Non-mandatory guidelines describe the content and elements of the SEA further, and provide a collection of examples on how assessment has been applied to specific bills, giving guidance on how to use the examples.[79]

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75 Elling and Nielson, op cit n 67, pp 13-14.

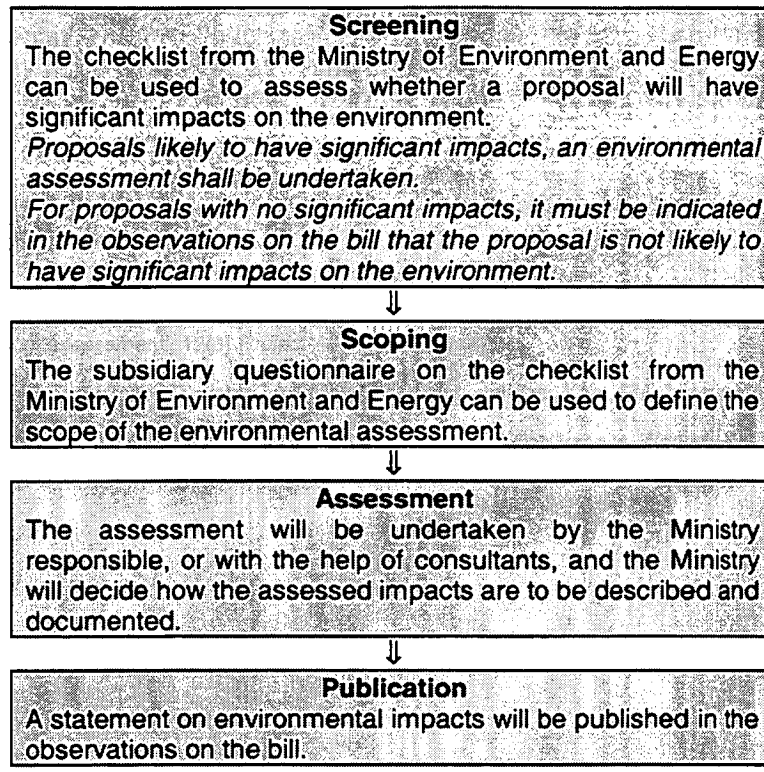
76 The second are dealt with in accord with the exemption under the EC project Directive - by a specific Act of national legislation; this was negotiated by Denmark in order that the Directive be in harmony with the Danish Constitution governing legislative procedure. See Koester, V, 1990. 'Review of European EIA Directive's Implementation in Denmark', in Commission on Environmental Policy, *Law and Administration, Review of the European Impact Assessment Directive's Implementation in the EEC Member States*, IUCN. Elling is especially critical of the use of this procedure, as it often fails to consider impacts on a regional scale. See Elling, B, 1994. 'EIA in Denmark', in Wathern, P, (ed), *EIA Legislation in the EC*, Belhaven Press, pp 1-28.

77 Ministry for the Environment, National Agency for Planning, *Guidance for EIA*, (April 1992), *Advice on the Environmental Assessment Procedure* (February 1994), and *Additional Guidance*, (17 October 1994).

78 Elling, B, 1994. 'Strategic Environmental Assessment - some results and perspectives', *Paper presented to the International Association for Impact Assessment*, Quebec City, p 3.

79 Ministry of the Environment, 1994. *Collection of examples on the environmental assessment of bills and other governmental proposals*, (draft in Danish).

Figure 4.1: Environmental assessment as specified in the Prime Minister's Circular (from Elling[80])



However objectives, alternatives and issues of uncertainty are not addressed,[81] and further development of procedure is needed.[82] Although screening and scoping are performed to a limited extent, there is no provision for the public to be involved in either before the publication of the final statement. In common with NEPA therefore, participation is primarily available under the legislative process, on the basis of the documentation attached to the proposal. The opportunities and limitations of this have been described as follows:

> Public consultation is often viewed as the very essential element in environmental assessment. But in policy EA matters of confidentiality occur. In some countries, like Denmark, *hearings* of other public authorities, representatives from business interest groups, regional and municipal authority representatives, and amenity groups, etc. are an essential part of the legislative process, especially in the phases in which bills are prepared for presentation in the parliament. An issue is whether this kind of hearing

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80 Elling, B, 1997. 'Strategic environmental assessment of national policies: the Danish experience of a full concept assessment', 12(3) *Project Appraisal*, p 164.

81 Kellererup, U, 1997 *The Danish SEA Procedure*, discussion document, EIA Centre, Manchester.

82 Hilden, M, and Laitinen, R, (ed) 1995. *The Nordic EIA-Effectiveness Workshop*, Nordic Council of Ministers/TemaNord: Copenhagen, p 11.

> can be viewed as a fulfilment of the intentions and the objectives of public participation, in scoping as well as impact assessment.[83]

In the first year of practice (from October 1993 to the end of May 1994), the Government submitted 261 proposals to parliament (the Folketing). Although the majority were concerned with procedural rules and 33 stated that they were likely to have no environmental impact, 35 of the other proposals stated that impacts were likely.[84] Of these the size and quality of the EA conducted varied greatly:

> The scope and the quality of the assessments actually carried out vary considerably. The description of environmental impacts varies from a few lines to some pages. The trend is that environmental impacts are described very shortly and in general terms; it has not been possible, or no attempt has been made, to quantify the impacts. In very few instances are the environmental impacts described in a thorough way. Obviously, quality will have to be improved conclusively in most cases.[85]

In order to build on the process, a project on the environmental assessment of policies was established and is presently being conducted. Phase 1 is now complete and was carried out as an SEA trial run, consisting of 2 case studies of bills.[86] Phases 2 and 3 will concentrate on the application of the principles to other sectors and strategic decisions, for example plans and programs. It will also look at facilitating the use of SEA by way of methods such as preparing manuals and guidelines.

Phase 1 has drawn a number of conclusions based on the assessment of the two bills. Concern is expressed about cumulative project impacts, and it is recommended that it may be appropriate for impacts to be determined on the basis of their direction rather than their scale or level of impact. In general, it is believed that it may be easier to hide negative impacts of bills, and it is therefore important that screening should be focused upon the direction of impacts in order for assessment to be successful.

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83 Elling, B, 1996. 'The Danish Experience' in Jaap de Boer, J, and Sadler, B, (ed), *Environmental Assessment of Policies: Briefing Papers on Experience in Selected Countries*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer, p 45.

84 Three bills were considered during this time on the basis of the environmental documentation attached to them: on the protection of coastal zones, on standards for energy effectiveness in energy consuming equipment, and on changes to motor vehicle registration taxes and energy taxes for mineral oil products. Although in each the information provided is acknowledged to be fairly comprehensive, it is accepted that this is largely because they had the aim of enhancing environmental protection. The second was also highlighted as a good example of a class assessment approach. See Elling. op cit n 78, pp 6-8.

85 See Elling, op cit n 83, pp 44-45.

86 The first is a retrospective review of an already completed assessment on a tenancy bill, and the second follows the application of the Administrative Order to the current legislative process on a private urban renewal bill. These were selected in part because each has an identifiable environmental impact, but neither has as its main objective environmental improvement.

The political context of the process is above all emphasised, together with limitations on data availability and time and resource constraints. The process is generally seen as positive, and it was found that opportunities for participation in the legislative process are largely equivalent to those under EA. However it was not recommended that the processes be the same, as this would inhibit the flexibility of the legislative process that is vital to its success.[87] The role of the contexts underlying assessment, and the political will required are therefore stressed:

> Danish experience of the EIA of policies has confirmed that barriers to EIA quality are not caused by a lack of data or technical/scientific deficiencies. Rather, they exist at the political/administrative level and are closely linked to the framework within which assessments are carried out and the various interests promoting the adoption of legislative bills.[88]

Most recently, figures have been produced for policy assessments carried out in the 1996/97 parliamentary year. These indicate that of 271 bills or government proposals presented to the Folketing, 59% contained a declaration stating that they would not cause environmental impacts, while 18% contained an assessment of the impacts expected. While SEA in Denmark is integrated with the normal process of bill preparation therefore, these figures confirm that the number of bills subject to the process is stabilising. This is perhaps an indication of the need to be selective if the process is to be effective; simply complying with the Order does not necessarily ensure this.

4.2 Finland – *Act on Environmental Impact Assessment Procedure* 1994

Together with Denmark, Norway and others, Finland is a member of the Nordic Council, which has done much to facilitate coordination of environmental initiatives in the member countries. A working party was established in 1990 to review EA procedures in the Nordic countries and 'work for the introduction of analysis and assessment of environmental impacts as a natural element in all sectoral planning and in decision-making at all levels'.[89] It should therefore be no surprise that each of these

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87 Op cit n 67, p 98.

88 Elling, B, 1997. 'Environmental Assessment in Denmark', 15 *EIA Newsletter.*

89 Cited in Gilpin, op cit n 63, p 77.

countries have furthered SEA development.[90] In Finland this has ambitious objectives:

> ...a central task of strategic environmental assessment as a policy instrument is to offer a systematic structure for the examination of connections between different strategic decisions in general and their connection to the state of the environment in particular. This task is not just about collecting empirical, scientific data for decision makers. The process has to also provide a coherent framework for participation and public debate, because both are important sources of knowledge in the assessment processes. A key issue will be the integration of environmental assessments into the preparatory processes of programmes, plans and other strategic decisions.[91]

Until recently there has been no comprehensive statutory basis for EA in Finland,[92] although it was acknowledged as an important tool for enhancing sustainable development.[93] Finland's membership of the EU and involvement in the Nordic Council changed this, as it was required to implement the EA Directive[94] and the United Nations Economic Commission for Europe (UNECE) *Convention on EIA in a Transboundary Context.*[95] In 1994, the Act on Environmental Impact Assessment Procedure (468/94) came into force.[96] This contains provisions for implementing both.

The Act also contains provisions for SEA, (in s 24). This states that for PPPs, environmental impacts 'shall be investigated and assessed to a sufficient degree.' However the procedures laid down in ss 4-13 for EA are not applicable to SEA, and instead reference is to be had to guidance issued by the Ministry of the Environment.[97] The Finnish Environment

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90 See Hilden, M, 1998. *EIA and its Application for Policies, Plans and Programmes in Sweden, Finland, Iceland and Norway*, Tema Nord: Copenhagen. Note that whilst Sweden has no provision for legislative EA, there are SEA requirements as part of the planning system. See Asplund, E, and Hilding-Rydevik, T, 1996. 'SEA Integration with Municipal Comprehensive Land-Use Planning in Sweden', in Therivel, R, and Partidario, M, *The Practice of Strategic Environmental Assessment*, Earthscan: London, pp 130-140.

91 Hilden, M, and Valve, H, 1995. 'EIA and its Application to Policies, Plans and Programmes in Finland', Finnish Environment Institute, p 5.

92 The *Environmental Permit Procedure Act* 1992 was the closest requirement for project EA prior to the EU Directive.

93 See Ministry of the Environment/Finnish Environment Institute, 1996. *Environmental Impact Assessment for Better Planning in Finland*, Helsinki; p 5 deals with PPPs.

94 Op cit n 64.

95 This concerns international cooperation on the assessment of transboundary impacts.

96 No 468/94, 10.6.1994. Types of project are prescribed in a separate EIA Decree.

97 Ministry of the Environment, Environmental Policy Department, 1994. *Report of Working Group*

Institute has been supporting the Ministry in the preparation of the guidelines, acting as the expert authority in charge of EA development.[98]

Draft guidelines were produced for PPPs at the end of 1996, and the procedures address most aspects of best practice SEA. These include: screening, formulation/consideration of alternatives, participation and cooperation, evaluation of impacts, production of the assessment report, monitoring, and tiering with other PPPs and projects.[99] Matters absent at this time include review and system monitoring. Final guidelines on the assessment of PPPs were published by the Ministry of the Environment in October 1998.

The development of SEA in Finland has also been prompted by a number of Council of State decisions which predate the 1994 Act. These include the requirement of the Council of State for all committee proposals to give consideration to environmental and economic impacts (216/90), and the requirement contained within the Ministry of Finance regulations for SEA of State action plans and economic strategies (1243/92). The *Act on Regional Development* also requires environmental impacts of national programs for regional development to be considered (1136/1993).[100]

Council of State decision 216/90 contains a requirement for legislative EA, and was designed to integrate the assessment of environmental and economic impacts. The working group developing the proposal heard representations from both the Ministry of Environment and the Ministry of Finance with a view to coordinating the two sets of guidelines that would be released. Environmental guidelines have yet to be finalised, because the Ministry of Finance plans to obtain the approval of the Council of State for its economic guidelines. This would give them an enhanced status, albeit lacking the force of law. An implication is that the environmental guidelines may be given the same status. Further delay is expected from this, as revisions will be necessary to ensure that both sets of guidelines conform with legislative requirements. [101]

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98 See information booklet, 1995. The Finnish Environment Agency, Helsinki.

99 *Guidelines for the Environmental Assessment of Plans, Programmes and Policies in Finland,* Proposal for Council of State Guidelines, Draft Dec 13, 1996

100 Ulla-Riitta Soveri, 1997. 'Strategic Environmental Assessment in Finland', Ministry of the Environment.

101 Hilden, M, 1997. 'Environmental Assessment in Finland', 15 *EIA Newsletter.*

In preparatory work carried out for both the guidelines for SEA and legislative EA, an appreciation of flexibility and context is acknowledged, with key principles of EA to be the focus. This is because '[d]ecision-making procedures within or between organisations do not necessarily follow official flow charts. Therefore it is important to define the unwritten rules and customary procedure.'[102] English translations of both of the SEA and legislative EA guidelines are awaited with interest, to see to what extent fuller consideration is given to procedural matters.[103]

4.3 European Commission – *Green Star System* 1994

The Commission of the European Communities (CEC) has been active in environmental policy-making for some time, with the Directorate-General for the Environment, Nuclear Safety and Civil Protection (DG XI) playing an important coordinating role.[104] The CEC has recently approved a final draft of the SEA Directive[105] to supplement the original EA Directive.[106] Although this does not apply to policies or legislation, a program of research is continuing into the effectiveness of EA and SEA,[107] including the Danish legislative EA provision.[108] Support for SEA is set out in the Fifth Action Programme on the Environment, which states that:

> Given the goal of achieving sustainable development it seems only logical, if not essential, to apply the assessment of the environmental implications of all relevant policies, plans and programs...

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102 Valve, H, 1997. 'SEA Research in Finland', *EU Workshop on SEA*, Potsdam.

103 Thanks are due to the Finnish Environment Institute and Ministry of the Environment, which kindly enabled me to participate in a seminar in Helsinki in September 1997. This helped greatly in an understanding of present and future developments.

104 See Ryan, P, 1991. 'The European Community's Environment Policy: Meeting the Challenges of the 90's' 1(6) *European Environment* pp 1-6, which describes the planning framework of the Action Programmes and key target sectors addressed.

105 European Commission, 1997. *Proposal for a Council Directive on the Assessment of the Effects of Certain Plans and Programmes on the Environment*, COM (96) 511 final. (OJ No C 129, 25.4.97) For commentary, see Tromans, S, and Roger-Machart, C, 1997. 'Strategic Environmental Assessment: Early Evaluation Equals Efficiency?', *Journal of Planning and Environmental Law* pp 993-996; Kornov, L, 1997. 'SEA: Sustainability and Democratization', 7 *European Environment*, pp 175-180; Feldmann, L, 1998. 'The European Commission's Proposal for a Strategic Environmental Assessment Directive: Expanding the Scope of Environmental Impact Assessment in Europe', 18(1) *Environmental Impact Assessment Review*, pp 3-14; and von Seht, H, and Wood, C, 1998. 'The Proposed European Directive on Environmental Assessment: Evolution and Evaluation', 28/5 *Environmental Policy and Law*, pp 242-249. Note that although there have been numerous drafts of the Directive, and a good deal of earlier commentary thereon, this does not form part of the thesis.

106 European Commission, *Directive 85/337/EEC*, op cit n 64.

107 DG XI, 1997. *EIA in Europe: a study on costs and benefits*, on internet at http://www.europa.eu.int:8071/en/comm/dg11/eia/costs-en.htm

108 See Elling and Nielson, op cit n 67.

> [A]n assessment of the implications for the environment will be made in the course of drawing up Community policies and legislation...[109]

The CEC decided to apply SEA to legislative proposals following concerns about the environmental impact of European laws. In 1992, an informal meeting of the CEC Environment Council agreed to look positively at the idea of attaching an EIS to legislative proposals likely to significantly impact on the environment.[110] In 1993 this was followed by an internal communication which was adopted by the Commission; this addressed all future strategic actions including legislative proposals.[111]

A screening process known as the 'green star system' was introduced by DG XI in 1994 for all items to be included in the 1994 legislative program. If proposals were considered likely to result in significant environmental impacts, they were to be marked with a 'green star' by DG XI (in consultation with the CEC as a whole), indicating that EA was required.[112] An informal, flexible process of scoping and self-assessment is used by each DG at the time it prepares its legislative program, in combination with a test for the economic impacts of proposals known as the 'fiche d'impact'. There is a requirement for an Explanatory Memorandum to describe and justify the environmental impacts expected, and outline costs and benefits. DG XI is available for consultations at an early stage to provide technical assistance and monitor progress:

> The significance of these developments can be seen in the context of the Commission's 1994 work plan, where no less than one-third of the proposals are 'flagged up' for consideration to be given to an SEA.[113]

The system forms part of the Commission's internal Manual of Operating Procedures which includes commitments to integration of the system with other policies, designation of officials with specific environment responsibilities, and requirements for annual reviews of DG environmental performance (both individually and collectively). Viewed together, the

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109 Commission of the European Communities, 1992. *Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development*, COM (92) 23 final, pp 66 and 76.

110 Wilson, E, 1993. 'Strategic Environmental Assessment: Evaluating the Impacts of European Policies, Plans and Programmes', *European Environment*, p 3.

111 SEC (93) 785/5.

112 Norris, K, 1996. 'The European Commission Experience' in Jaap de Boer, J, and Sadler, B, (ed), *Environmental Assessment of Policies: Briefing Papers on Experience in Selected Countries*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer, p 55.

113 Institute of European Environmental Policy, 1994. *SEA: Implications for the English Countryside*, IEEP, p 24.

green star system, the EA and SEA Directives, the commitment to sustainable development through the Action Plans and use of the Manual of Operating Procedures put the CEC in the forefront of environmental law and policy-making worldwide.

4.4 Norway – *General Administrative Order* 1995

Norway has focused on environmental issues for some time. In 1972 it was one of the first countries to establish a Ministry of Environment, which has played a major role since in influencing national policy.[114] EA is provided for under planning legislation,[115] and although not a member of the EU, Norway has implemented the European EA Directive as a member of the European Economic Area (EEA).[116]

In its 1994 environmental policy statement, the Norwegian government stated that it intended to continue the development of rules and guidelines concerning the use of EA in connection with government decisions, plans and programs. This was to be included within the new *General Administrative Order*, with plans to develop an Order specifically for SEA.[117] Most of the SEA experience in Norway to date however has derived from informal experience with the project on SEA for road and transport plans, which is to be coordinated with the EAs conducted in connection with the Norwegian road and road traffic plan.[118]

The *Administrative Order for SEA* would apply to both bills and draft regulations, either submitted to the Norwegian parliament (the Storting), or adopted by the government. Although the *General Administrative Order* requires the assessment of both environmental, economic and social effects, the SEA Administrative Order would focus upon environmental effects alone. The purpose is to enhance environmental conduct and control in the work of ministries and the government, focusing on impacts

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114 See Gilpin, op cit n 63, p 106.

115 *Planning and Building Act* 1985 as revised in 1989 and 1995/1996. See also Ministry of Environment, 1990, *Environmental impact assessment in Norway: provisions in the Planning and Building Act relating to environmental impact assessment*, Ministry of Environment: Oslo.

116 Op cit n 64; for an overview of the successes and failures of the project EA system, see Husby, S, et al, 1997. 'Six Years with environmental impact assessment in Norway', *NIBR Report* 20.

117 See Lind, T, 1994. 'Proposed Administrative Order on Strategic Environmental Assessment of Ministerial and Governmental Proposals' *Conference Paper*, Den Haag.

118 Ministry of Environment, *Environmental Policy Statement 1995*, p 126.

during the formulation stage. Screening provisions are to be used to highlight key sectors likely to cause environmental impacts.

Although the *General Administrative Order* has included consideration of the environment since 1995, it focuses upon economic impacts, and the specific SEA Order has yet to be implemented. However Guidelines have been initiated by Deputy Ministers which include: screening with criteria for sustainability, consideration of alternatives, the production of an EIS, self-assessment, and consultation with the Ministry of Environment. There is no reference to public involvement, nor any requirement for the Guidelines to be reviewed in the future, and although the intention is that the Guidelines will be implemented by an *Administrative Order on SEA*, this may take some time.[119]

In a 1997 report to the Storting, sustainable development was firmly established as the framework for all developments in environmental policy, including SEA. One of the resulting proposals is for the establishment of a committee to identify and propose changes in legislation 'that may inadvertently impede or provide inadequate incentive to sustainable development.'[120] As well as providing for monitoring of environmental policy generally and the production of annual State of the Environment Reports, this suggests that measures for legislative EA may well be included within the *Administrative Order on SEA* when it appears, and that it may be used as a routine part of the policy-making process in the future.

4.5 Comparisons

In Europe there are many similarities in the approaches taken to legislative EA. In each of the jurisdictions the context of sustainable development has guided legislative EA, as the interconnectedness of environment, economy and society has been understood. A demonstration of this is seen in the link between the environmental and economic assessments carried out on legislative proposals in the EU and Finland. This will be considered further with regard to Canada and the Netherlands in Chapters 7 and 8.

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119 Information kindly supplied by Martin Hansen, Ministry of Environment, *personal communication*, Oslo, September 1997. Note that the Guidelines are not at this time a public document, and at the end of 1997 were being discussed by a number of ministries. In late 1998, their future is extremely uncertain.

120 Ministry of Environment, *Environmental Policy for a Sustainable Development*, (Report to the Storting No 58, 1996-97), p 11.

With the exception of Finland, (which has a legal requirement for SEA but will introduce both SEA and legislative EA through guidelines), each of the jurisdictions has favoured a policy rather than legal basis for the introduction of procedures. There is a greater likelihood of its acceptance if discretion is available. Finally, with the exception of Denmark with regard to SEA, legislative EA procedures are distinct from the procedures for either EA or SEA, in recognition of the need to relate assessment procedures to their context of operation, in this case the legislature. [121]

With regard to the structure and content of the various procedures, most are flexible and based upon self-assessment. Provisions for screening and the production of an EIS are common to all, and opportunities for participation are available under the Finnish process. Although the Finnish process appears to be the most rigorous of the requirements, there are weaknesses with all, particularly with regard to review and monitoring. However as these have been the weak link in EA to date, so it is to be expected that they will similarly be neglected until other aspects are working well.

Only in the CEC and Denmark has there been any experience of the legislative EA procedures. In Finland, guidelines have only recently been introduced, and in Norway it is possible that they will not be for some time. There is little information on the outcome of the CEC 'green star system', so aside from the E-test, practice with the Danish *Administrative Order* is the most useful indication of European experience with legislative EA to date.

In Denmark, positive procedural aspects include provisions for self-assessment and screening and scoping, together with broad application to a number of effects. Although participation in the process are limited, there are at least opportunities present under the legislative process. However the failure to consider alternatives is the biggest obstacle to effectiveness, together with inadequate consideration of cumulative effects.

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121 The same can also be said of the Dutch Environmental Test here. It was introduced within a context of sustainable development, is distinct from other requirements for both EA and SEA, and is closely related to the legislative context of its operation.

5. Australia – *Environment Protection and Biodiversity Conservation Bill* 1998

This section considers the effectiveness of the SEA requirement in s 146 of the *Environment Protection and Biodiversity Conservation Bill* 1998. This contains provisions for the application of EA to PPPs. It analyses the implementation of the recommendations of the 1994 consultancy report,[122] and makes reference to how s 146 relates to the remainder of the Bill, especially the provisions for EA. The general objective of SEA in the Bill is the promotion of Ecologically Sustainable Development (ESD), one of the objects of the Bill as a whole laid down in s 3(1)(b).

ESD is defined with reference to the principles of ESD in s 136(3). While a number of important principles are present, those absent include: the public trust doctrine, the subsidiarity principle, and the polluter and user pays principles. The first two are addressed to some extent by ss 3(a)(i) and 3(b)(i) and (vii), but these do not go far enough and should be stated more clearly. The polluter and user pays principles are completely absent. Although there is reference to cost-effectiveness in s 3(b)(iv), the Bill should be amended to ensure their specific inclusion. The Financial Impact Statement included in the Explanatory Memorandum to the Bill makes much of the benefits of the environment often being used without charge; the polluter and user pays principles should be included to remedy this inequity.

5.1 Legal basis

S 146 of the Bill contains provisions for SEA which are known as strategic assessments. The section derives from recommendations made in an SEA consultancy report commissioned by the Commonwealth Environment Protection Agency into environmental impact assessment (EIA) reform (note 122). While the *Environment Protection (Impact of Proposals) Act* 1974 was also intended to apply to these types of proposals, in practice it was limited to projects (see Chapter 2, section 2.2).[123] Australia-wide, the state that has been most successful with the introduction of SEA has been Western Australia.[124] However Australia has

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122 Court, J, and Associates Pty Ltd and Guthrie Consulting, 1994. *Assessment of cumulative impacts and strategic assessment in environmental impact assessment*, Commonwealth of Australia.

123 Wood, C, 1992. 'Strategic environmental assessment in Australia and New Zealand' 7 (3) *Project Appraisal* p 144.

124 Wood, C, and Bailey, J, 1994. 'Predominance and Independence in Environmental Impact Assessment: the Western Australian Model' 14 *Environmental Impact Assessment Review* pp 37-59; Sippe, R, 1996.

in general been closely involved with SEA, and many EIA practitioners and academics have taken a keen interest in procedural and methodological issues.[125]

In 1994, the SEA consultancy report was released following the public review of the Commonwealth EA process.[126] This made recommendations for policy, administrative and legal measures, and indicated resource implications. The legal measures recommended an *Ecologically Sustainable Development Bill* incorporating SEA. The present Bill uses a framework of ESD to guide EIA and biodiversity conservation. Seven individual recommendations were made for incorporation into the SEA division, which set out in Table 4.3.

Table 4.3: Provisions for Incorporation in the SEA Division of the proposed ESD Bill

It is recommended that provisions be incorporated in the SEA Division:	
a)	to require that strategic environmental assessments be undertaken on all legislation presented to the Parliament where triggered by designated screening criteria;
b)	to require that strategic environmental assessments be undertaken on all new government programs of a designated type and/or having an expenditure above a designated value;
c)	to allow ecologically sustainable criteria to be established in subordinate legislation against which SEA of legislation, policies, plans and programs will be assessed;
d)	to establish triggering criteria in subordinate legislation of the type listed in Section 8.2.2 a) above
e)	to establish administrative procedures and scientific methods of assessment for CIA analysis to be followed by sponsoring ministers and their agencies of the type listed in Section 8.2.2 b);
f)	to require that the SEA analyses be individually exposed to public review subject to prescribed confidentiality tests on an annual basis by tabling a summary report of SEAs to the Federal Parliament;
g)	to allow progressive implementation of the requirement by region, sector, industry type, affected ecosystem type, or other appropriate determinant.

'The Australian State Experience – Western Australia' in Jaap de Boer, J and Sadler, B, *Environmental Assessment of Policies: Briefing Papers on Experience in Selected Countries*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer.

125 McCarthy, M, 1996. 'Strategic Environmental Assessment: Rhetoric or Action?' 33(3) *Australian Planner* pp 125-131; Bailey, J, and Renton, S, 1997. 'Redesigning EIA to fit the future: SEA and the policy process' 15(4) *Impact Assessment* pp 319-334; Brown, L, 1997. 'The Environmental Overview as a realistic approach to Strategic Environmental Assessment in developing countries' in Porter, A, and Fittipaldi, J, (eds), *EIA Methods Review: Retooling Impact Assessment for the New Century*, Army Environmental Policy Institute: Fargo, pp 127-134; Buckley, R, 1997. 'Strategic Environmental Assessment' 14(3) *Environmental and Planning Law Journal* pp 174-180.

126 Op cit n 122, p 8.1.

5.2 Procedures

The Bill screens proposals with reference to matters of national environmental significance in Part 3, Division 1. Under s 146(1), these requirements are also applicable to SEA. There are a number of exclusions from the matters of national environmental significance which arguably should be included. Forestry practices and environmental matters of relevance to a number of states (such as the Murray Darling Basin) are obvious examples. Ministerial discretion should be restricted in s 146 by establishing a parliamentary committee to screen strategic proposals against matters of national environmental significance. Those proposals which are believed likely to have significant potential impacts could then be subject to a mandatory process of assessment, which should take one of the four forms set out in Part 8, Division 3.

The scope of the assessment will affect the decision on the form of documentation to be used. S 146(2)(a) does not specify whether each of the reporting options under s 87 are applicable to strategic assessments, but s 87(3)(b) implies that they are not. This is illogical. The potential for impacts from PPPs is far greater than the potential from individual projects, because the former set the framework for the latter. In preparing strategic assessments, there should also be a choice of whether to proceed with preliminary documentation, a public environment report, an environmental impact statement or an inquiry. This could be decided by a committee established to screen strategic proposals against matters of national environmental significance.

There is no provision for the consideration of alternatives in s 146 or in the Bill as a whole. It is essential that this be included in the Bill or in any regulations prescribed thereunder. Environmental effects of any alternatives (including the 'do-nothing' alternative) must be considered in the documentation prepared on proposals if policy choices are not to be pre-empted or foreclosed. The 1987 *Administrative Procedures* setting out the content of an impact statement contained this requirement, which should apply to both strategic and project proposals.

Economic and social matters are mandatory considerations to be taken account of under s 136(1)(b) in making decisions on approvals and conditions. There is no limit to these considerations, which is in sharp contrast to environmental issues, which are restricted to matters of national environmental significance. While it may be legitimate and

appropriate for the role of the Commonwealth to be limited in environmental matters, by analogy this should also be the case in economic and social matters, many areas of which are also within the control of the states. Other factors to be taken account of should also include cumulative impacts, which are related to strategic assessments in the SEA consultancy report.[127] There is no provision for the consideration of cumulative effects in the Bill. Since the potential of these is great, this should be rectified by their inclusion in regulations to be prepared under s 146(2)(g).

Public comment is provided for following the publication of the draft report under s 146(2)(b). The nature and extent of this is, however, entirely discretionary. This is inadequate to ensure that equity concerns are met. While the publication of a draft report for public comment is possible under s 146(2)(d), since the same requirements for documentation in s 87 are not applicable to SEA, opportunities for public involvement are more limited.

Public participation requirements in the Bill are weak and based on discretion, and this is true of both SEA and EA. Under s 146, the public have no right to refer proposals for assessment, and no right to participate in the scoping phase. An assessment is only required by agreement between the Minister and the proponent after screening the proposal against the matters of national environmental significance, and the agreement with decide on the scope of the assessment. Public participation is only possible after a draft report has been prepared, and no detail is provided as to the extent of this, which is presumably also dependent on the content of the agreement.

This is completely unacceptable. The public should have an opportunity to refer significant strategic proposals for assessment, as they may be in the best position to know what effects proposals may have on their communities; and they should be involved in deciding on the terms of reference of any assessment, as they may have valuable contributions to make. Regulations to be passed under the Bill should include provisions for both of these matters.

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127 Op cit n 122.

5.3 Administration

S 146(1) of the Bill provides that: 'The Minister may agree in writing with a person responsible ... that an assessment be made'. By analogy with ss 92-105, which require self-assessment in preliminary documentation, public environment reports and environmental impact statements, self-assessment should also be required for strategic proposals. This should be clearly stated. Tiering is subject to the Ministers' discretion under Note 1 of s 146. Applying the process at this time also complies with the precautionary principle, which is set out in s 136(3)(b)(ii).

There is no independent oversight of either the SEA or EA processes. This is a significant weakness of the Bill, and while it remains there is potential for bias without adequate redress. S 28 contains requirements for approval of activities of Commonwealth agencies significantly affecting the environment; however this does not deal with concerns of partiality, as approval by the Environment Minister provides none of the independence needed. Independent oversight of many areas of Australian public environmental performance is lacking. While the establishment of reporting mechanisms is to be commended, in the long term there is a need to establish an Australian Environmental Commissioner to evaluate each of these areas; the Canadian and New Zealand models may be used in the development of such an office (see Chapter 2, section 2.1d).

Monitoring is a significant weakness of s 146 and the Bill as a whole. Although provisions for monitoring are present in Part 17, Division 3, these are limited to practical measures for enforcement. The most appropriate monitoring mechanism in the Bill is the provision for environmental audits to be carried out in Part 17, Division 12. This needs to be given greater emphasis, and made specifically applicable to SEA.

5.4 Application to legislative proposals

There is no specific requirement for the Bill to be applied to legislative proposals, and no definition of PPPs to indicate whether legislation is included. The absence of a definition is perhaps due to the difficulty of determining when a PPP comes into effect. This lack of certainty may prevent the application of the s 146 requirement as it stands. Legislation

does not have the uncertainties of PPPs; applying SEA to bills can utilise the existing legislative process of drafting and approval.[128]

If EIS's were prepared on bills presented to parliament, they would automatically be exposed to public review. This is a major reason why it is important that legislation should be assessed, and that assessment documentation should not be limited to proposals submitted to the government, (where issues of cabinet confidentiality arise); instead, documentation should also be made available to the parliament, as the body of legislative review. A requirement for a summary report to be tabled to parliament on SEAs could supplement this. This could be prepared by the parliamentary committee screening all legislative proposals, and it would form the basis of an audit that could be prepared at a later time. In this way, the appropriate checks and balances would exist to ensure that equity concerns were adequately met.

There is a requirement in the *Cabinet Handbook* for ESD to be considered in submissions made to cabinet (see Chapter 3, section 2.2b).[129] While there is no requirement for an EIS to be prepared, there is no reason why there should not be, as impact statements are routinely prepared on Business Regulation and Legal Services.[130] Once a Bill is prepared and approved by cabinet, the impact statement should also accompany its passage through parliament. There is a requirement for a Financial Impact Statement to accompany legislative proposals, and to ensure each of the dimensions of ESD is fully addressed, impact statements should also consider environmental (and social) matters.

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128 Marsden, S, 1998 'Importance of Context in Measuring the Effectiveness of Strategic Environmental Assessment, 16(4) *Impact Assessment and Project Appraisal* pp 255-266.

129 Department of Prime Minister and Cabinet, 1994. *Cabinet Handbook*, AGPS: Canberra, cll 5.40, and 5.41.

130 Marsden, S, 1997. 'Applying EIA to Legislative Proposals: Practical Solutions to Advance ESD in Commonwealth and State Policy-Making', 14(3) *Environmental and Planning Law Journal* p 164.

Conclusions

This Chapter demonstrates that SEA is increasingly applied to legislative proposals. Legislative EA has a history as long as NEPA's (section 1), and more recent applications in Canada, the Netherlands, Denmark, Finland, the CEC and Norway demonstrate that it will continue to play an important role in the future (sections 2-4). Each of these jurisdictions has introduced requirements with the objective of sustainable development, and several seek to integrate environmental and economic impacts.

The proposed legal implementation of SEA requirements by the Commonwealth is a commendable step in the right direction. Most of the other countries with recent SEA provisions have opted for policy implementation until further experience is gained. While the extensive use of Ministerial discretion denies much of the certainty and transparency that a legal framework should bring, the legal requirement is a useful introduction to such an important instrument of environmental policy, planning and management (section 5).

SEA in Australia has significant potential to make a contribution to the advancement of ESD, especially if procedural matters are adequately addressed. SEAs should set out and relate to specific objectives, consider alternatives, cumulative impacts and other matters of national environmental significance, be documented in the same forms as other assessments, and include detailed provisions for public participation.

The proposed requirement should be specifically applied to bills, as recommended by the consultancy report. Effective SEAs of draft legislation comply with many of the international principles through the legislative process. Significance should be decided by a committee, with alternatives and participation a feature of the parliamentary process. If this is done, the legislature may provide the independent oversight needed.

Chapter 5 considers the need for effectiveness to be evaluated through the use of principles and criteria, including the need to examine the context of any assessment process. Chapter 6 examines existing evaluation criteria and develops a method of evaluating legislative EA in the two countries which have used it the most, Canada and the Netherlands.

PART 2:

APPLYING CRITERIA TO EVALUATE PROCEDURES AND CONTEXTS

Chapter 5 - Effectiveness Evaluation

Introduction

The purpose of this chapter is to consider the ways in which effectiveness evaluation has developed to date and is developing. The Chapter begins by looking at the purpose and rationale of effectiveness evaluation, examines the importance of context in any research undertaken, and analyses the use of principles and criteria for measuring performance. The Chapter is an introduction to the theory and practice of evaluation, the tools of which are developed further in Chapter 6.

The first section considers definitions, terminology and objectives of evaluation. Differences between process and procedure, and types of performance measurement are indicated. The three different approaches to evaluation are considered: formative, summative and transactive. Finally, the four dimensions of effectiveness are analysed: procedural, substantive, transactive and contextual. The thesis takes a transactive approach, and focuses upon the procedural and contextual dimensions.

The second section examines the purpose and rationale of considering the contexts that underlie any assessment process, and the limitations of evaluating this. Three different but overlapping contexts are suggested: social/political, environmental/economic and legal/administrative. The first two are important for EA and SEA, the third for legislative EA. Each of these are examined in some depth, with significant aspects indicated. Criteria for evaluating these contexts are developed in Chapter 6.

The third section considers the use of effectiveness criteria, most of which address only the procedural dimension. Definitions, terminology and objectives are examined, and principles and criteria are distinguished. The similarities and differences between SEA and EA principles and criteria are analysed, and the relationship between objectives, principles and criteria determined. Finally, the use of decision criteria is examined, and the links between procedure and context considered. This third section will explain the purpose and application of the criteria developed in Chapter 6.

1. Purpose and rationale

The need to develop standardised methodologies for evaluating the effectiveness of EA has been with us for some time, and this section considers the purpose and rationale for developing these. In 1988 the Canadian Environmental Assessment Research Council (CEARC) highlighted this as one of three research needs.[1] Although a number of approaches to measurement have since been advocated, there has been little coordination of research efforts until recently. The International Study into the Effectiveness of Environmental Assessment emphasised that performance measurement should be used to evaluate future EA development, and in the Final Report the meaning of 'effectiveness' was considered extensively.[2]

However both the Final Report and a supplementary report on SEA (the 'SEA Report') focus on procedural issues, and in the SEA Report in particular, substantive considerations are left to future work;[3] (see section 1.3 for the difference between substantive and procedural effectiveness). Establishing causation presents problems, particularly for SEA:

> Many aspects of EA effectiveness are difficult to evaluate... This is especially the case with SEA... because often the chain of cause and effect is unclear or attenuated.[4]

Two reasons may be advanced to explain why: procedure is not often linked with objectives, and contextual issues are either ignored or underestimated. As a result, procedure dominates effectiveness studies. At the 1997 Annual Conference of the International Association for Impact Assessment (IAIA), it was pointed out that this serves only to hide important aspects of substantive effectiveness, including the influence of contextual issues on EA.[5]

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1 Canadian Environmental Assessment Research Council, 1988. *Evaluating EIA: An Action Prospectus*, CEARC: Hull.

2 Sadler, B, 1996. *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance, Final Report*, International Study of the Effectiveness of Environmental Assessment International Association for Impact Assessment/Canadian Environmental Assessment Agency - The 'Final Report' p 22.

3 Sadler, B, and Verheem, R, 1996. *Strategic Environmental Assessment: Status, Challenges and Future Directions*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer - the 'SEA Report' - p 20. Procedural and substantive effectiveness are defined in section 1.3.

4 Ibid, p 19.

5 Swensen, I, 1997. 'EIA Effectiveness: Some Methodological Questions', *Paper given to IAIA Conference*, New Orleans.

1.1 Definitions, terminology and objectives of effectiveness evaluation

Effectiveness evaluation enables checks to be made on how well a process or procedure is working, both procedurally and substantively. In the context of environmental policy, and with regard to EA and SEA, consideration may therefore be given to: theoretical and practical EA and SEA, or any individual component of either. Reference to 'individual components' includes any aspect of either process or procedure. Although the terms 'process' and 'procedure' are often used interchangeably, for the purposes of the thesis procedure is those aspects of EA which must be complied with by law or policy, and process includes both procedure and aspects of EA which may not be required, but which in practice tend to be part of the system.[6]

Evaluating effectiveness is concerned with performance measurement, which may include post-project analysis, auditing and monitoring.[7] Although these terms may be used synonymously, as they may also be given particular meanings, it is important to be aware of their potential differences. Post-project analysis has been used in the broadest way to include auditing, monitoring, and evaluation.

Auditing is a specific term for an examination of accounts, and it is usually required by legislation; environmental auditing is a much broader term, less likely to be required by law, and may include an examination of procedural compliance in addition to financial aspects.[8] Monitoring is concerned with repetitive measurement, and it may be divided into a number of different activities including the measurement of individual effects or of the system as a whole. It may also consider compliance with regulations, such as those for pollution emissions. Finally, evaluation is primarily concerned with effectiveness, and whether procedures laid down

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6 Devuyst, D, 1994. *Instruments for the Evaluation of EIA*, unpublished PhD thesis, Vrije Universiteit: Brussels, p 545.

7 For an overview, see Devuyst, ibid, pp 43-44; and Arts, J, 1998. *EIA Follow-Up: On The Role of Ex-Post Evaluation in Environmental Impact Assessment*, Geo Press: Groningen. Note that performance measurement is today common in all areas of life. In the public arena in Canada, see Muller-Clemm, W, and Barnes, M, 1997. 'A Historical Perspective on Federal Program Evaluation in Canada', 12(1) *The Canadian Journal of Program Evaluation,* pp 47-70; and Jorjani, H, 1998. 'Demystifying Results-Based Performance Measurement', 13(1) *The Canadian Journal of Program Evaluation*, pp 61-95.

8 For further information, see Buckley, R, 1991. *Perspectives in Environmental Management*, Springer-Verlag: Berlin, pp 121-164, and 'Environmental Auditing' in Vanclay, F, and Bronstein, D, (ed), 1995. *Environmental and Social Impact Assessment*, Wiley and Sons: Chichester; Sippe, R, 1994. 'SEA in Western Australia and Auditing EA for Effectiveness', *Paper presented at the Annual Conference of the IAIA*, Quebec City; and Environment Protection Agency, 1996. *Environmental Auditing*, Commonwealth of Australia.

facilitate the objectives set for them.[9] Evaluation has been defined as 'obtaining, organizing and weighing information on the consequences, or impacts, of alternatives'.[10]

There are a number of different types of evaluation, of which two have been identified. The first groups studies according to the use to which they are put, and may include project management or EA process development. The second identifies the type of study undertaken, which may be scientific and technical or procedural and administrative.[11] An alternative but overlapping categorisation of evaluation considers process, methodology, goal achievement and concepts.[12]

Procedural and administrative studies deal with EA process effectiveness, and system monitoring is the term for this when applied to the EA process as a whole. The purposes of this are the 'diffusion of EIA practice and the amendment of the EIA system to incorporate feedback from experience and remedy any weaknesses identified.'[13] However amendment of the EA system is only one aspect of effectiveness, as better procedures in themselves will not necessarily result in better outcomes. Although procedural effectiveness is the most important part of this thesis, substantive effectiveness is also more likely to be achieved if the context of the assessment is understood and legislative EA procedures are integrated with it. This therefore also plays an important part in evaluating the examples of legislative EA considered.

By 'context' is meant the framework that underlies the EA system. Three overlapping contexts are distinguished in section 2 below, two of application to any type of EA or SEA and one of specific application to legislative EA. The first two are the social/political context of democratic government, and the environmental/economic context of sustainable development. The third is the legal/administrative context which affects how legislative proposals are prepared and implemented. An 'ideal'

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9 A distinction may be drawn between the emphasis placed on compliance with expected standards under an audit and the making of subjective judgements that may be present in an evaluation. See Sadler, B, 1988. 'The evaluation of assessment: post-EIS research and process development', in Wathern, P, (ed) *Environmental Impact Assessment: Theory and Practice*, Routledge: London, p 130.

10 McAllister, D, 1980. *Evaluation in Environmental Planning*, MIT Press: Cambridge, p 3.

11 See Devuyst, op cit n 6, pp 45-46.

12 Spalding, H, Smit, B, and Kreutzwiser, R, 1993. 'Evaluating Environmental Impact Assessment: Approaches, Lessons and Prospects' 22(1) *Environments*.

13 Wood, C, 1995. *Environmental Impact Assessment: A Comparative Review*, Longman: Harlow, p 241.

context is therefore suggested for each; it is argued that EA and SEA procedures are likely to be more effective if these contexts are present, and procedures are well integrated with them.

1.2 Approaches to evaluation

The purpose of evaluation research is to '...measure the effects of a program against the goals it set out to accomplish as a means of contributing to subsequent decision making about the program and improving future programming.'[14] This applies to EA and SEA substantive effectiveness evaluation, the first dimension of effectiveness (see section 1.3 below). 'Formative' and 'summative' evaluations may be distinguished. The first results in information which helps improve the proposal evaluated before it is implemented, and the second does the same thing following its adoption.[15]

A third type of evaluation, termed 'transactive', is a mix of the two.[16] It is concerned with the overall effectiveness of the review process and why certain aspects succeeded or failed. As it takes account of the context in which the process operates it is of particular interest, highlighting underlying factors which may exercise a substantial influence on the process itself. All three approaches are set out in Table 5.1 below, and while in discussing procedures the thesis deals with the formative approach to evaluation, the emphasis is upon the transactive approach.

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14 Weiss, C, 1972. *Evaluation Research: Methods for Assessing Program Effectiveness*, Prentice-Hall: Englewood Cliffs, p 4.

15 Ibid, p 17.

16 Sadler, B, 1990. *An Evaluation of the Beaufort Sea Environmental Assessment Panel*, FEARO: Ottawa.

Table 5.1: Evaluation Approaches and their Characteristics (based on Sadler 1990)

Research Characteristics	*Type of Evaluation*		
	Summative	**Formative**	**Transactive**
1. Focus	Goal attainment; concerned with results	Operational performance; concerned with procedures	Process effectiveness; concerned with relationships of procedures and policy
2. Purpose	Marketing; product promotion	Learning; procedural improvement	Understanding; process development
3. Objectives	To determine impacts on planning and decision making	To identify how well mechanisms and techniques worked	To establish the forces influencing operational performance and/or goal attainment
4. Approach	Objective and mechanistic	Subjective and humanistic	Mixed and holistic
5. Methodology	Quantitative and detached; emphasis on scientific reductionism and rigour in data collection and reliance on standardized techniques to produce defensible and verifiable results	Qualitative and interactive; emphasis on liaison with participants to establish their perceptions and attitudes; reliance on "soft" or experiential date to diagnose problems and potential improvements	Composite model; emphasis varies depending on circumstances and pre-conditions; policy and institutional analysis utilized to establish broader context
6. Timing	After the fact	After the fact or ongoing	Both. Emphasis on phased approach, including discrimination between immediate and longer-term program effects
7. Evaluator	Independent and external to responsible agency	Internal and external	Independent, may be internal if policy implications warrant

Finally, evaluation involves five major activities: formulating questions, criteria and standards; selecting designs and sampling procedures; collecting information; analysing information and reporting information.[17] The criteria developed for EA should be seen as part of this research continuum (see Chapter 6).

17 Kosecoff, J, and Fink, A, 1982. *Evaluation Basics: A Practitioners Manual*, Sage Publications; these are discussed by Devuyst, op cit n 6, pp 61-63. A similar five-stage evaluative process is set out by McAllister; this involves identifying the problem, designing alternative solutions, evaluating the alternatives, deciding on the action to be taken and implemented through the political process, and monitoring the results; op cit n 10, p 5.

1.3 Dimensions of effectiveness

Two dimensions of effectiveness have been described in the SEA Report, substantive and procedural.[18] The first is used to determine the extent to which EA performance meets 'established purpose(s), goals and objectives', and the second to which it meets 'accepted provisions and principles'. Procedural effectiveness is therefore evaluated by examining compliance with EA procedures, and substantive effectiveness by examining the changes to the environment that have resulted from their use.[19] However compliance in itself does not produce change; although it may help in facilitating it, the difficulties of measuring change are acknowledged.[20] As an example, the process for evaluating the effectiveness of implemented legislation has been termed the 'substantive review' stage, the difficulties of which are outlined below:

> The objectives of such a substantive review are to determine the quality of the environment before and after implementation, and to isolate the effects of a particular policy. There are three stages involved. First, changes in environmental quality must be identified. Secondly, these changes must be linked to their causal factors. Finally, the causal factors, in turn, must be linked to the influence of a policy.[21]

Above all outcomes need to be emphasised. While the impact of EA or SEA on the decision-making or policy formulation process is most likely the greatest determinant of change, other factors such as the amendment of the EA system and involvement of the public are concerned with both procedural and substantive effectiveness. It was said some time ago that 'there has been a trend away from concern with formal procedural issues toward concern with the effectiveness of EIA in actually reducing environmental impacts, and the efficiency of the process in terms of its costs in time, money and manpower'.[22] With regard to the former, this sadly does not appear to have been emphasised in the design of effectiveness criteria since. Most are still closely linked with procedure,

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18 Op cit n 3, p 19.

19 Op cit n 5.

20 Bartlett, R, and Baber, W, 1989. 'Bureaucracy or analysis: implications of impact assessment for public administration', in Bartlett, R, (ed) *Policy Through Impact Assessment*, Greenwood: New York, pp 148-149.

21 Wathern, P, Young, S, Brown, I, and Roberts, D, 1987. 'Assessing the Impacts of Policy: A Framework and an Application' 14 *Landscape and Urban Planning*, p 328.

22 Hollick, M, 1986. 'Environmental Impact Assessment: An International Evaluation', 10(2) *Environmental Management*, p 158.

with too little emphasis on underlying goals and objectives.[23] The need to link criteria with principles and objectives is a vital aspect of evaluating change.[24] (see section 3.3 below)

Transactive effectiveness is a third dimension, and is concerned with the economic costs of the EA process.[25] It is the most important consideration in a recent United Nations Environment Programme (UNEP) report. This is not surprising given its emphasis on effective EA for developing countries, as economics is often the initial concern.[26] It is also one of the criteria used by Wood to evaluate effectiveness.[27] Economic costs arise in a number of different situations including: preparing documents, review, participation, administration, inevitable delays, uncertainty, mitigation and monitoring.[28]

A fourth dimension is the contextual one. As EA has grown in different contextual situations, it would be wrong to assume that developments successfully employed in one jurisdiction would necessarily be successful in another. Prevailing political cultures and policy frameworks therefore need to be understood if EA is to play a role in decision-making. SEA operates in similar territory to other environmental policy instruments, and there is a good deal of overlap between each. It is therefore appropriate to consider how SEA corresponds with Sustainable Development Strategies (SDSs) and State of the Environment Reporting (SoER).[29] Finally, social and economic contexts need to be understood as much as their political and environmental counterparts. Each are linked with one another: in section 2.2a social and political contexts are considered together, with the same objective of democratic government; in section 2.2b environmental

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23 Note Sadler and Verheem's diagrammatic representation of this: 'Figure 1. Schema for Evaluating EA Effectiveness', op cit n 3, p 19.

24 Doyle, D, and Sadler, B, 1996. *Environmental Assessment in Canada: Frameworks, Procedures and Attributes of Effectiveness*, A Report in Support of the International Study of the Effectiveness of Environmental Assessment, Minister of Supply and Services Canada, p 24, where judging performance is stated to depend upon meeting goals that have been set.

25 Sometimes a distinction is drawn between effectiveness and efficiency, the latter which concentrates on this third dimension. Note that the transactive dimension of effectiveness should not be confused with the transactive approach to evaluation.

26 Scott Wilson Resource Consultants, 1996. *Environmental Impact Assessment: Issues, Trends and Practice*, United Nations Environment Programme/Environment and Economics Unit: Nairobi, p 12.

27 See Wood, op cit n 13, chapter 18.

28 Wathern, P, 1994. *Environmental Impact Assessment: Theory and Practice*, Routledge: London, pp 25-26.

29 Note that Sadler points to the importance of a policy planning context and an implementation-management system. These are both encompassed here; op cit n 9, p 130.

and economic contexts are considered together, with the same objective of sustainable development.

2. The importance of context

> The effectiveness of an SEA is defined by the extent to which it meets its objectives... (this) requires, *inter alia*, sound procedure, appropriate methodologies, competent practitioners, and above all, a reasonably supportive political culture.[30]

The purpose of this section is to consider how a greater understanding of context may help in measuring effectiveness. Interpreted broadly, the 'reasonably supportive political culture' emphasised in the SEA Report points to aspects of the social/political and environmental/economic contexts which impact upon the operation of EA.[31] To these may be added the legal/administrative context, which is included with specific reference to legislative EA. These will be described and analysed here, and criteria will be developed based upon them.[32] Such criteria may be used to evaluate whether the right conditions exist for the successful implementation of SEA and legislative EA.

2.1 Purpose, rationale and limitations

Having a supportive political culture goes hand in hand with political will, and the success of NEPA may in large part be attributed to this.[33] Political will must be demonstrated by all concerned - proponent, public, government and assessing and review body. While effective SEA must be based upon clear procedure guided by explicit objectives, without a supportive political culture or political will SEA is unlikely to progress at all. A number of contextual elements form part of this political culture, and all of them fall within the contextual frameworks below. These include:

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30 Op cit n 3, p 117.

31 See Partidario, M, 1996. 'Strategic Environmental Assessment: Key Issues Emerging From Recent Practice', 16 *Environmental Impact Assessment Review*, pp 31-55, where policy and institutional contextual issues are discussed. The former includes both accountability and participatory aspects, the latter regulatory aspects; all are included within the four contextual areas to be outlined.

32 These criteria are reproduced in Marsden, S, 1998. 'Importance of Context in Measuring the Effectiveness of SEA', 16(4), *Impact Assessment and Project Appraisal*, pp 255-266.

33 Although most commentators agree that NEPA compliance has changed decision-making, this is perhaps as much to do with the acceptance of environmental values in US national culture, as enforced by public law and policy. See Caldwell, L, 1989. 'Understanding impact analysis: technical process, administrative reform, policy principle,' in Bartlett, R, (ed), *Policy Through Impact Assessment*, Greenwood: New York, p 12; and Baber, W, 1988. 'Impact Assessment and Democratic Politics', 8 *Policy Studies Review*, pp 172-178.

the degree of openness of the process and freedom of information, whether the procedures are administrative or statutory, the extent of political and bureaucratic discretion, and the ease of access to the courts by public interest groups.[34]

An understanding of these frameworks is also necessary to enable comparisons to be made. SEA does not exist in isolation,[35] and without this understanding it is unrealistic to expect that what is learnt in one country may be applied in another.[36] However the limitations of a failure to focus directly on substance must be remembered. Conclusions reached as a result of applying contextual criteria are likely to be tentative, as the inability to isolate the cause of change remains. The criteria developed are suggested as a means of understanding the contextual frameworks that underlie the operation of SEA generally and legislative EA specifically.

2.2 Suggested contexts

a. Social/political

Public involvement in decision-making is arguably the most important aspect of the social/political context. Without general public understanding of the difference between passive consultation and active participation, it is unlikely that the public will be in a position to contribute to a specific policy process such as SEA.[37] It has been said that public involvement 'bridges the gap between participatory and representative democracy by allowing individuals some opportunity to influence decisions normally decided by higher authorities'.[38]

A participatory democracy involves members of the public in decision-making, whereas in a representative democracy the public give power to others to act on their behalf. Representative democracies are more common, but whatever type of democracy is present, public involvement is

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34 Hollick, op cit n 22, p 175.

35 Swensen, op cit n 5.

36 Masser, I, and Williams, R, (ed), 1986. *Learning From Other Countries: The cross-national dimension in urban policy-making*, Geo Books: Norwich, in Foreword, p xiv.

37 See Devuyst, op cit n 6, p 56, where he comments that 'EIA can only work in democratic systems which take into account the view of the population.'

38 Roberts, R, 1995. 'Public Involvement: From Consultation to Participation', in Vanclay, F, and Bronstein, D, (ed), *Environmental and Social Impact Assessment*, Wiley and Sons: Chichester. Note however that there may be a conflict between the nature of democracy and EA, where an overriding environmental decision may be incompatible with the supposed impartiality of government; see Baber, op cit n 33, p 175.

paramount. With regard to EA specifically, it is clear that developments in participation have been reasonably successful in transfer to the policy level, including the development of legislative proposals:[39]

> Consultation has typically taken place on a project-by-project basis, especially in the environmental field. This is now shifting dramatically to include ongoing consultation and participation in the development of policy, legislation, (and) regulations... Many of the approaches to public involvement... are being transferred to the policy and program areas of government with much success.[40]

Participation in environmental decision- and policy-making is most common through the use of the public inquiry mechanism (see Chapter 3, section 2.1a); involvement in strategic planning and development control processes (see Chapter 3, section 2.1 also); and, less frequently, through opportunities for consultation on government policy and legislative developments (see Chapter 3, section 2.2 and 4.4).

An important part of public participation generally are the values and interests of those involved in the process.[41] Using EA as an example, the subjective judgements of those conducting an assessment[42] need to be balanced by those with interests in it.[43] Pure objectivity is not possible. Groups of individuals with disparate perspectives may be less vulnerable to narrowness of perception and analysis; however even then the group may be compromised by the background and dominance of certain members:

> The objective and subjective judgments made in impact assessment are based upon values, feelings, beliefs, and prejudices and are functions of the professional, social, and institutional contexts of those conducting the assessment.[44]

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39 This links with the principle of accountable government discussed above.

40 Op cit n 38, p 243.

41 For background, see Buchholz, R, 1993. *Principles of Environmental Management*, Prentice Hall: Englewood Cliffs, pp 82-86.

42 For a discussion of the rationalist and anti-rationalist theories of decision-making which are connected with the subjective judgements of those who administer the EA process, see Culhane, P, Friesma, H, and Beecher, J, 1987. *Forecasts and Environmental Decision Making: The Content and Predictive Accuracy of Environmental Impact Assessment*, Westview Press: Boulder, pp 2-4.

43 Weiss believes the primary context for any program is the social context of the 'organization that sponsors and conducts' it; for SEA this would be the proponent. However she also refers to the larger social context of neighbourhood and community, national laws and values, and the participants. See Weiss, op cit n 14, pp 107-109.

44 Baber, W, op cit n 33, p 175. See also Matthews, W, 1975. 'Objective and subjective judgements in environmental impact analysis', 2(2) *Environmental Conservation*, pp 121-131; and McAllister, op cit n 10, pp 235-241. In the latter the difference between citizen and expert judgement is discussed. See also Rowson, J, 1997. 'The Appraisal of EIA Processes: Towards a "Situated" Approach', in Sinclair, A (ed), *Canadian Environmental Assessment In Transition*, Department of Geography, University of

There is widespread agreement that countries with 'open and flexible' political systems are more likely to be successful in the application of SEA.[45] Two elements of a political system may be distinguished: the prevailing political or organisational culture,[46] and the structure of decision-making. As the former will determine *whether* and under what circumstances SEA can be introduced, so the latter will determine *how* SEA is applied.[47]

With regard to political and organisational culture, four aspects have been highlighted: the character of the policy-making process, the level of political accountability, the degree of activism and influence of interest and community groups, and the existence of arbitration procedures.[48] The level of political accountability is particularly important, as it is the key principle of democratic government. Representing interests cannot be effective if there is no way of checking on whether and how this is done, and the obvious practical means of compliance in a democracy is the need for re-election.[49]

With regard to the structure of decision-making, there is a need for: an institutional framework to help with integrated decision-making; an organisational framework to ensure that links between departments are in place; a clear division of responsibilities; and a clear regulatory framework to ensure consistent application. An institutional framework is needed for cooperation and coordination of evaluation. A body to oversee the SEA process is one approach, which can operate as a central information and guiding agency. An organisational framework is related to it, and may consist of small-scale committees made up of key members in the various departments. Division of responsibilities is seen in the creation of independent bodies to oversee the process. The alternative of self-reporting tends in practice to be more common.[50] Although also important

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Waterloo, pp 323-359. Rowson argues that evaluations are just as influenced by those carrying them out as assessments, and that participants views of the evaluation process are often overlooked. Objectivity may therefore be questioned.

45 Op cit n 31, p 40, and O'Riordan, T, and Sewell, D, (ed), 1981. *Project Appraisal and Policy Review*, John Wiley: London, p 4.

46 This is distinct from the broad definition of 'political culture'.

47 Op cit n 3, p 76.

48 O'Riordan and Sewell, op cit n 45, pp 4-8.

49 Whether this is a sufficient means of accountability is however doubtful; this is why the ultimate short term sanction for a failure to exercise democratic government is the 'no confidence' motion.

50 Op cit n 31, pp 42-44.

here, the fourth aspect is an important part of the economic framework and will be considered below.

b. Environmental/economic

There is a need for an overriding national environmental policy to guide policy tools such as SEA. The use of Sustainable Development Strategies (SDSs) is the best example; ideally these should be tiered from national to local strategies in the same way and for the same reasons that SEA is tiered from policies to projects. This is illustrated with regard to the tiering of SEPPs, REPs and LEPs in New South Wales. It is also important that the effectiveness of strategies be subsequently recorded through monitoring mechanisms such as State of the Environment Reports (SoERs). Again parallels with SEA are clear, as is whether the need for preparing strategies and reports are enshrined in policy or is codified in law.[51]

SDSs and SoERs are interrelated, with each guided by developments in international law and policy. 'Agenda 21' for example directed countries to the institutional advantages of their establishment.[52] The policy link between the documents is important as one should lead on from the other, the success or failure of the SDSs being monitored and reported on in the SoERs. Successful strategies have been found to be those that have common objectives and characteristics, which are flexible, and which utilise existing action plans where they are available.[53]

The relationship between SEA, SoER and SDSs is demonstrated by the contribution of each to sustainable development. SoER provide useful baseline data for assessments, and SoER may report on the success of SDSs subsequently. SDSs may also be assessed, as clearly such strategies contain policy and details regarding implementation. While the application of SEA is most effective during strategy development, it is also quite possible for assessments to be undertaken subsequently.[54]

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51 See Marsden, S, 1997. 'Applying EIA to Legislative Proposals: Practical Solutions to Advance ESD to Commonwealth and State Policy-Making' 14(3) *Environmental and Planning Law Journal*, pp 160-161.

52 See Grubb, M, 1995. *The Earth Summit Agreements: A Guide and Assessment*, Earthscan: London.

53 Carew-Reid, J, Prescott-Allen, R, Bass, S, and Dalal-Clayton, B, 1994. *Strategies for National Sustainable Development: A Handbook for their Implementation*, International Union for the Conservation of Nature/ International Institute for Environment and Development/Earthscan: London.

54 In the Netherlands there is some interest in this. The first National Environmental Policy Plan (NEPP) proposes the application of SEA, and interviews with Verheem, R, and Jaap de Boer, J, have confirmed

Economic frameworks relate closely to environmental ones because, as with any policy instrument, cost effectiveness plays a role in SEA. The concern of governments with efficient regulation suggests that there is an emphasis upon implementing objectives at the lowest financial cost. This has been highlighted by both existing effectiveness studies and the development of the Regulatory Impact Analysis Statement process (RIAS) in Canada. Derived from the US Regulatory Impact Analysis (RIA) process, RIAS was introduced in 1986 to meet concerns about overregulation (see Chapter 7).

However only as a result of the implementation of the SEA provision in 1990 has RIAS been required to consider the environment explicitly. This appears a common trend, which is paralleled in the Netherlands with the use of the Business Effects Test (BET) and the Environmental Test (E-test) operating in tandem[55] (see Chapter 8).

Legislation is not the only way in which efficient regulation may be achieved. There are a number of other tools available which may be implemented administratively, including the use of standards, subsidies, taxes and marketable permits.[56] Each may be used to meet environmental objectives; they are particularly popular with economists in certain circumstances, as in principle they lead to greater cost effectiveness. Legislation remains the predominant means of implementation however, and each of the above tools are commonly enabled by legislation in any event. Cost concerns have meant that it is not surprising that processes such as RIAS developed to minimise those involved.

c. Legal/administrative

The legal/administrative context is concerned with policy implementation through the preparation and implementation of legislation, and most policies are implemented in this way. An understanding of how this is done is necessary to evaluate the effectiveness of legislative EA. Legislation may be either principal/primary, where it takes the form of Acts (statutes)

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the potential application of this to the NEPPs themselves; personal communication, September 1996. In Canada the 'Blue Book' refers specifically to the possibility of the former Green Plan being assessed, and the role of the Commissioner for the Environment and Sustainable Development is closely tied up in an assessment of the SDSs to be produced by each of the departments.

55 See de Vries, Y, and Tonk, J, 1997. 'Assessing Draft Regulations - The Dutch Experience' 5(3) *Environmental Assessment*, pp 37-38.

56 See Hahn, R, 1989. *A Primer on Environmental Policy Design*, Harwood.

passed by the legislature, or subordinate/secondary/delegated where it comprises regulations (statutory instruments), passed by the executive under and in accord with the Act.

The Westminster legislative system is common to many jurisdictions, including Australia and Canada, and permits the executive undue control.[57] Not only is it able to dominate the passage of principal legislation by virtue of its majority in the legislature, but it is able to pass subordinate or delegated legislation through the use of enabling sections in statutes. Commonly known as 'Henry VIII Clauses', these are 'named after that monarch in disrespectful commemoration of his tendency to absolutism'.[58] In 1929 the Committee on Ministers' Powers was established in the UK under the Chairmanship of Lord Donoughmore to examine the use of delegated legislation. In 1932 it issued its report which condemned the practice of amending Acts by delegated legislation, commenting:

> It cannot but be regarded as inconsistent with the principles of parliamentary government that the subordinate law-making authority should be given by the superior law-making authority power to amend a Statute which has been passed by the superior authority... Even with safeguards... it is clearly a power which in theory at any rate may be unscrupulously used... It is a standing temptation for Ministers and their subordinates... to attempt to seize for their own Departments the authority which properly belongs to Parliament... The use of the so-called "Henry VIII Clause"... should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the Bill.[59]

Since the publication of the Donoughmore committee report, the use of Henry VIII Clauses has been abandoned in the UK. However their use continues in other jurisdictions, including Australia and Canada (which will be considered in Chapter 7). In the Australian State of Queensland, their use was found to be widespread by the Committee of Subordinate Legislation.[60] The Committee considers all subordinate legislation, (including regulations under any Act which are required to be laid before

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57 In Australia, see McIntosh, G, 1989. *Rounding up the Flock? Executive Dominance and the New Parliament House*, Commonwealth of Australia. This found that only 43% of MPs thought that Parliament was an effective check and monitor of the Executive. The Australian and Canadian situations are similar in that they comprise elements of the US separation of powers, where not only are the executive, legislature and judiciary theoretically divided, but a federal system is in place. This means that power is also shared with the states and provinces respectively.

58 Government of Queensland, 1990. *Henry VIII Clauses - A Report of the Law Reform Commission*, QLRC, R39, p 1.

59 *Committee on Ministers' Powers*, 1932. Cmd. 4060, pp 293-294.

60 An example of the use of Henry VIII Clauses has also been seen in Tasmania where regulations approved under the *Land Use Planning and Approvals Act* 1993 were designed to prevent the legislature objecting to the construction of a new road for which legislative approval should have been required. See *Land Use Planning and Approvals (Application of Act) Regulations* 1994.

the House), to see if they are consistent with the principal legislation they are made under. If not, the Parliament has the ability to revoke them under the disallowance power. The Committee made its opposition to their use very clear in a 1984 report, stating:

> The committee continues to oppose the practice of amending Acts of Parliament by subordinate legislation. It is the Committee's firm belief that if a matter is sufficiently important to be incorporated in an Act, it ought to be amended only by an Act. If a matter is of such lesser importance that it can be amended by subordinate legislation, then it ought to be written as subordinate legislation in the first instance.[61]

The powers of the legislature are greatly diminished as a result of the use of Henry VIII Clauses, and opportunities for public involvement and accountability are reduced. Although subordinate legislation may also be used in civil law jurisdictions, it is not used by the executive to avoid recourse to the legislature.[62]

3. The use of principles and criteria

This section considers evaluation criteria, largely in the framework of the relationship between objectives, principles and criteria. Criteria are first defined, and different terms are discussed together with their underlying objectives. They are linked with EA and SEA objectives and principles, and through considering two of the most well known international criteria, it is argued that further development must take greater account of this link in order that effectiveness may be measured. Finally, the link between procedure and context is examined prior to the development of contextual criteria in Chapter 6.

3.1 Definitions, terminology and objectives of EA principles and criteria

Criteria are instruments used in the measurement of EA and other policy tools. Usually based upon the objectives of EA, they enable checks to be made with compliance.[63] 'Principles' and 'criteria' are similar in that they

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61 Committee of Subordinate Legislation, Legislative Assembly, Queensland, *Fourteenth Report of the Committee of Subordinate Legislation*, 1984. (Chairman, Simpson, G, MLA).

62 This was discussed with Elling, B, with regard to Denmark during an interview; *personal communication*, Copenhagen, September 1997.

63 See Weiss, op cit n 14, pp 26 and 34, where it is made clear that there is a need to formulate specific goals if criteria are to be developed in such a way as to be effective.

both need to be related to the objectives of EA; although the terms are often used interchangeably, criteria may be distinguished in that they may operationalise principles in the form of a question. The relationship between them and the purpose and rationale of criteria has been described as follows: '[e]valuation criteria are, in effect, shorthand versions of principles for EIA and, carefully articulated, have considerable advantages in terms of brevity and clarity.'[64]

Procedural criteria are dominated by aspects of the EA process laid down by law or policy. Process criteria may be distinguished; although they often overlap with procedural criteria, they may contain aspects of the EA process for which there is no procedural requirement.[65] Contextual criteria look beneath aspects of the EA process to underlying factors which may play a significant role in influencing procedural compliance. In addition, they may determine the success or failure of attempts to bring about substantive change. Both procedural and contextual criteria should be based upon objectives if they are to have any realistic hope of achieving this.

Substantive criteria are rare, with very few exceptions, (see Hollick's criteria in section 3.3a, and Mostert's in section 3.4). As a result, the development of EA procedural principles and criteria are considered in some detail (see Chapter 6). These are the commonest type to date, have much in common with SEA principles and criteria, and are the easiest to develop and apply. Two Canadian studies illustrate this: the first highlights the difficulties of substantive measurement,[66] and the second comments that until substantive tests are available, procedural criteria should be used.[67] However the limitations of evaluating effectiveness through compliance with procedures should be remembered:

> Where formal EIA requirements exist, a measurement of procedural compliance can be useful, even though it provides only a limited conception of EIA effectiveness... Such compliance, however, does not assure that the

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64 Wood, C, 1994. 'Lessons from Comparative Practice', 20(4) *Built Environment*, p 335. In developing criteria to conduct a comparative review of EA systems Wood drew on three things: existing evaluation frameworks, procedure, and aims of EA; op cit n 13, pp 10-11.

65 For the purposes of this thesis, they are treated the same. For an illustration of an approach which distinguishes the two see Fischer, T, *SEA of Transport PPPs in the EU*, PhD thesis in progress, Manchester EIA Centre, Manchester.

66 See Spalding et al, op cit n 12, p 68.

67 Bregha, F, 1990. *Report on the Workshop on Strengthening the EA of Policy*, CEARC: Hull, p 13.

environmental information generated will have any influence on how alternative plans are formulated and projects are designed.[68]

A number of EA process evaluations have been undertaken to date, and these indicate the importance given to various aspects of evaluation in the field.[69] These are excluded as not directly relevant to the procedural discussion below. They include those prepared by the European Commission,[70] the Netherlands EIA Commission,[71] van de Gronden,[72] Munro et al,[73] and Hilden and Laitinen.[74] The World Bank[75] and North Atlantic Treaty Organisation[76] have also promoted good practice, and emphasised the need for evaluation. Reviews of EIS quality have been undertaken by Lee and Colley,[77] Devuyst,[78] Ross,[79] the Netherlands EIA Commission,[80] and the Netherlands Ministry of Housing, Spatial Planning and the Environment.[81] Similarly, although EIS evaluations form no part of

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68 Ortolano, L, Jenkins, B, and Abracosa, R, 1987. 'Speculations on When and Why EIA is Effective', 7 *Environmental Impact Assessment Review*, p 285.

69 A number of those that follow are compared by Sippe, 1996. 'Improving Effectiveness in EIA Through Quality Assurance and Environmental Acceptability Criteria', *Paper given to the Annual Conference of the IAIA*, Estoril.

70 Commission of the European Communities, 1993. *Report from the Commission on the Implementation of Directive 85/337/EEC*, Commission of the European Communities: Brussels.

71 Netherlands Commission for Environmental Impact Assessment, 1996. *Experiences and Views Presented by and to the Commission for EIA*, Utrecht.

72 Van de Gronden, E, 1994. *The Use and Effectiveness of Environmental Impact Assessment in Decision Making*, Ministry of Housing, Spatial Planning and the Environment: The Hague.

73 Munro, D, Bryant, T, and Matte-Baker, A, 1986. *Learning From Experience: A State-of-the-Art Review and Evaluation of Environmental Impact Assessment Audits*, CEARC: Hull.

74 Hilden, M, and Laitinen, R, (eds), 1995. *The Nordic EIA Effectiveness Workshop*, Nordic Council: Copenhagen.

75 World Bank, 1995. *Environmental Assessment: Challenges and Good Practice*, Environment Department Paper No 018, The World Bank: Washington DC.

76 North Atlantic Treaty Organisation, 1993. *Methodology, Evaluation and Scope of Environmental Impact Assessment*, Report 197, Committee on the Challenges of Modern Society, NATO: Brussels.

77 Lee, N, and Colley, R, 1992. *Reviewing the Quality of Environmental Statements*, Occasional Paper 24, Department of Planning and Landscape, University of Manchester: Manchester.

78 Devuyst derives four basic evaluation criteria from EA procedures which he believes are essential to the success of those procedures. The criteria are: completeness, open and public character, objectivity and verifiability. The criteria are believed to supplement the 'Environmental Statement Review Package' developed by Lee and Colley in 1990, by enabling scores to be given to those aspects of the EA process considered; op cit n 6, pp 82-92.

79 Ross, W, 1987. 'Evaluating Environmental Impact Statements', 25 *Journal of Environmental Management*, pp 137-197.

80 Netherlands Commission for Environmental Impact Assessment, 1993. *Yearbook of the Commission for Environmental Impact Assessment*, VROM. See also J Scholten, 1995. "Reviewing EISs/EA Reports", *Paper presented to the Workshop: Strengthening EIA*, Canberra.

81 Ministry of Housing, Spatial Planning and the Environment, 1994. *The Quality of Environmental Impact Statements*, VROM: The Hague.

the thesis, they demonstrate the importance that the EIS has retained in the process to date.

3.2 Objectives and limitations of SEA principles and criteria

The purpose and rationale of SEA principles is similar to that of the EA principles considered above, to enable checks to be made on compliance with SEA procedures. However SEA principles need to take account of differences of approach and application. While the objectives of SEA may be similar to EA, it is necessary to adapt rather than adopt EA procedures and be aware of the differences which make EA principles impractical to use.[82] Compiling flexible principles and criteria and developing matrices, checklists and questionnaires based thereon is a useful first step,[83] because:

> It seems that in dealing with policies, selection of key principles of EIA, and their invocation through the policy generating process - not in a structured EIA framework, nor necessarily by the EIA assessing authority - appears to offer the best hope of success until international experience builds up and more sophisticated methodologies emerge.[84]

However the principles that follow have much in common with the EA principles considered in the previous chapter. Procedure dominates, and neither address substantive effectiveness to any real extent. Continuing work on sustainable development indicators illustrates how substantive criteria may be developed for screening, with measurement possible after the decision has been taken. Following the completion of a number of recent SEA case studies, a number of possible indicators (criteria) have been recommended for evaluating other aspects of substantive effectiveness. Aside from the decision criteria considered in section 3.4 below, others are beyond the scope of either this chapter or the thesis. However no doubt future attention will be directed towards these:

> Possible indicators are the change of and influence on the PPP (policy, plan or programme) and its lower tiers, increased motivation, awareness, information, education, the increase in transparency that results from the

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82 Differences between EA and SEA are documented in Chapter 3.

83 For a more detailed consideration of the approaches and techniques used to carry out SEA, see Therivel, R, 1996. 'SEA Methodology in Practice,' in Therivel, R, and Partidario, M, *The Practice of Strategic Environmental Assessment,* Earthscan: London.

84 Sippe, R, 1994. 'Policy and EA in Western Australia: Objectives, Options, Operations and Outcomes', *Paper presented to the International Workshop on Policy EA,* The Hague, p 1.

SEA process, which could be measured e.g. by the number of arguments that are added to the discussion.[85]

3.3 Relationship between objectives, principles and criteria

A well founded EA system - one that meets widely agreed objectives, principles, and criteria - is a cornerstone for good practice and effective performance.[86]

There is a need for criteria to be based on principles and objectives if effectiveness is to be realisable. 'Principles' and 'criteria' are often used interchangeably, although criteria are best used to operationalise principles in the form of questions for the purpose of an evaluation. More importantly, for the most part existing evaluation frameworks have failed to outline the relationship adequately between objectives and principles and criteria. Exceptions are those developed by Hollick,[87] and the UNEP,[88] and these are considered below. Although the main objective of EA is sustainable development, there are a number of other related objectives which are again similar to those of SEA (see Chapter 3, Table 3.1). An example of some of the more important objectives are those for the Californian system, one of the more highly regarded internationally, and which is applicable to both EA and SEA. These are set out in Table 5.2 below.

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85 Commission of the European Communities, 1997. *Case Studies on Strategic Environmental Assessment, Volume 1: Comparative Analysis of Case Study Findings, Conclusions and Recommendations*, DG XI, European Commission: Brussels.

86 Doyle and Sadler, op cit n 24, p 23.

87 Op cit n 22.

88 Cited in Gilpin, A, 1995. *Environmental Impact Assessment: Cutting Edge for the Twenty First Century*, Cambridge University Press: Melbourne, pp 83-84.

Table 5.2: EA Objectives (Bass and Herson, 1993).

1.	To disclose to decision makers and the public the significant environmental effects of proposed activities.
2.	To identify ways to avoid or reduce environmental damage.
3.	To prevent environmental damage by requiring implementation of feasible alternatives or mitigation measures.
4.	To disclose to the public reasons for agency approvals of projects with significant environmental effects.
5.	To foster interagency coordination.
6.	To enhance public participation.[89]

a. 'Goals, objectives, principles and evaluation criteria for EIA' (Hollick, 1986)

Hollick's criteria are a useful approach to evaluation,[90] and are summarised below in Table 5.3. Hollick has been commended for his 'relatively clear and detailed criteria', and for his criteria being 'specifically tied to goals'.[91] He also poses some substantive questions, and considers previous efforts to reach the goals set to distinguish the influence of EA. As an example, from the overriding *goal* of protecting the environment from damage, one of the *objectives* is to ensure that environmental factors are taken into account in decision-making. One of the *actions* (termed principles here) is education of decision-makers, and one of the *possible evaluation criteria* is whether the EA results in changes to the proposal.[92]

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89 Bass, R, and Herson, A, 1993. *Successful CEQA Compliance: a Step-by-Step Approach*, Solano Press: Point Arena, p 1.

90 Op cit n 22, p 10.

91 Op cit n 5.

92 For the purpose of this thesis, Hollick's 'actions' are the same as principles as defined above; op cit n 22, p 161.

Table 5.3: Goals, Objectives, Principles and Evaluation Criteria for EIA (based on Hollick, 1986)

GOALS ⇒	OBJECTIVES ⇒	PRINCIPLES ⇒	CRITERIA
Environmental Protection	1. Information available to decision makers	1.1 Selective application	(a) All relevant proposals assessed? (b) Alternatives considered? (c) EISs objective and unbiased?
		1.2 Use of multi-disciplinary teams 1.3 Improvements in prediction methods 1.4 Improvements in evaluation methods	(d) Methods available for multidisciplinary, predictive, evaluative studies?
	2. Environmental factors in decision making	2.1 Education of decision makers 2.2 Statutory obligation to consider environment 2.3 Public interest action to force compliance	(e) Change to proposal? (f) Conditions attached more rigorous with EA? (g) Environment better integrated with EA? (h) Open or closed EA process? (i) Standing to sue? (j) Discretion available in EA application?
	3. Coordinating agency decision making	3.1 EA Review 3.2 Cooperation in EA preparation	(k) Coordination as a result of EA? (l) State coordination?
	4. Coordinating state environmental policies	4.1 Uniform EA policies	
	5. Environmental management for life	5.1 Enforced mitigation 5.2 Monitoring of mitigation measures 5.3 Periodic impact reassessment 5.4 Management improved 5.5 Public funding	(m) Are these actions more effective with EA?
Public Participation	6. Public involvement at all stages	6.1 Early, continuous participation 6.2 Public review 6.3 Public inquiries 6.4 Statutory freedom of information	(n) Better participation opportunities with EA? (o) Does participation result in greater acceptance of decisions? (p) Does participation improve decisions?
Economic Efficiency	7. Cost minimization/ benefit maximization	7.1 EA integrated with environmental management system 7.2 Proponent/ community cost/ benefit	(q) How well are procedures integrated? (r) What has or could be done to reduce costs? (s) Do benefits outweigh costs?

However the difficulties with Hollick's criteria are the same as the difficulties of evaluating substantive effectiveness through 'goal attainment' in general:

> Specificity and clarity of goals is a critical component of evaluating goal attainment. The greater the specificity and clarity of goal statements, the more amenable EIA is to evaluation by this approach. The rare use of this approach likely reflects the undefined or poorly stated goals of many EIA statutes and policies. Its rarity may be further explained by the difficulty of

isolating the effects of EIA so that goal attainment can be reliably attributed to the EIA process.[93]

b. 'Goals and Principles for EIA' (United Nations Environment Programme – UNEP, 1986)

The UNEP Working Group of Experts on Environmental Law developed criteria at about the same time as Hollick, and these have been employed to evaluate individual EA systems elsewhere.[94] The final UNEP proposal consisted of a Preliminary Note, three Goals, and thirteen Principles. The contribution of EA to sustainable development is contained within the Preliminary Note, and the Goals deal with the need for assessment, the establishment of national processes, and cooperation between nations. The Principles themselves deal with coverage and timing, content, participation, contribution to decision-making, and monitoring.[95]

3.4 Influencing outcomes through decision criteria (Mostert, 1995)

The criteria set out by Mostert in Table 5.4 below,[96] are useful ways of measuring an aspect of the substantive dimension of effectiveness, as they aim to evaluate the influence of EA on the decision-making process. The decision criteria are similar to sustainable development indicators, as they attempt to measure environmental change by comparing present environmental conditions with outcomes following implementation.[97]

Mostert believes that decisions are improved if they lead to better environmental conditions. Emphasising the context of their development, he states that decisions should be both 'sustainable' and 'acceptable'.

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93 See Spalding et al, op cit n 12, p 68.

94 See Fookes, T, 1987. 'A Comparison of Environmental Impact Assessment in South Australia and Proposed United Nations Environment Programme Goals and Principles', *Environmental and Planning Law Journal*, September.

95 Bonine, J, 1987. 'Environmental Impact Assessment: Principles Developed', 17/1 *Environmental Policy and Law*, pp 5-6.

96 Mostert, E, 1995. *Commissions for Environmental Impact Assessment: Their Contribution to the Effectiveness of Environmental Impact Assessment*, Delft University Press: Delft

97 There are many examples of sustainable development indicators, some of which are included in the Mostert decision criteria. For examples, see Organisation for Economic Cooperation and Development, 1991. *Environmental Indicators*, OECD: Paris; International Institute for Sustainable Development, *Sustainable Development Indicators – Selected Sources*, available on the internet at www.iisd.indicators.ca; Jacobs, P, 1990. 'A Proposed Set of Eighteen Criteria that Might Characterize Sustainability', in Smith, E (ed), *Sustainable Development through Northern Conservation Strategies*, University of Calgary Press: Calgary, pp 23-25; Hodge, R, 1996. 'A Systematic Approach to Assessing Progress Toward Sustainability', in Dale and Robinson (ed) *Achieving Sustainable Development*, University of British Columbia Press: Vancouver, pp 267-293; Clayton and Radcliffe, 1996. 'Assessing Sustainability' in *Sustainability: A Systems Approach*, Earthscan: London.

Sustainable decisions are those which incorporate the full range of sustainable development principles that were discussed in Chapter 2, section 1.1. Acceptable decisions are those which are carefully prepared, with the reasons for taking them explained to the parties in an understandable way. The need for decisions to be 'acceptable' is superfluous, as in addressing the social aspect of sustainable development, equity concerns must be met as a matter of course.

Table 5.4 sets out decision criteria alongside other indicators of effective EA. On the left hand side of the table, procedural and information matters are cited which are common to many of the other principles and criteria discussed in Chapter 6. On the right hand side are the matters specifically related to sustainable development and decision-making. These include the character of decision-making, issues which deal with sustainability and acceptability, and a category of more general decisions and activities.

The character of decision-making in part VI of the table includes aspects which are an important feature of the context of any decision-making process, in particular the openness of the system of which it is a part. This was discussed in section 2 above, and criteria for evaluating such matters are developed in Chapter 6, section 3.2. The other aspects included in parts VIII and IX of the table are also to some extent included (or should be) within the other issues; acceptability aspects within part VII (because they address equity concerns), and more general decisions and activities such as monitoring within part I (where as a result of the process, feedback results in subsequent improvements).

Part VII of Table 5.4 contains the most important aspects of the decision criteria, which are common to sustainable development indicators. These include indicators for alternatives, mitigation, compensation and cancellation. Alternatives are given particular emphasis, because it is very important that each alternative is evaluated for its influence upon each of the issues which has potential to influence environmental outcomes. These include minimisation of fossil fuels, land use, waste, risks and uncertainties, and mobility.

Taken as a whole, Mostert's indicators are a useful contribution to broadening the range of criteria which may be used to evaluate any EA process. Although this thesis concentrates upon evaluating procedural and contextual dimensions of effectiveness, decision criteria and

sustainable development indicators must be linked with other aspects of effectiveness if they are to become more widespread tools in the future.

Table 5.4: Indicators of Effective EIA (Mostert, 1995)

I: PROCEDURAL CHARACTERISTICS
- EIA early, at least before issue of permit or adoption of plan
- EIA process parallel with planning/permitting process; links between procedures
- Screening process
- Scoping process
- Monitoring
- Public review
- Requirement to motivate decisions
- Free access of information
- Possibilities for public participation and legal action
- Broad scope, including a requirement to develop alternatives

II: QUALITY OF INFORMATION
- Relevance (perspicuousness, completeness)
- Scientific quality
- Bias

III: USE OF INFORMATION
- Citations in documents, discussions etc.
- Changed ideas on desirability
- Change in proposal (new or changed [partial] alternatives, mitigations measures, compensation, project specific monitoring)
- Internalization of environmental concerns

IV: USE OF THE PROCEDURE/PROCESS
- Use of possibilities for public participation
- Use of possibilities for legal action

V: ANTICIPATION
- Remarks during interviews with initiators and competent authorities (difficult to distinguish from internalization of environmental concerns)

VI: CHARACTER OF DECISION-MAKING
- Amount of communication (eg existence of project groups, informal contacts)
- Procedural "streamlining"
- Decision-making more open, more "accountable" and "greener"

VII: SPECIFIC DECISIONS A: SUSTAINABILITY
- Choice of better (partial) alternative from point of view of:
- Minimization of use of non-renewable resources (eg fossil fuels)
- Limitation of use of renewable resources to the regenerating capacity of the environment
- Minimization of land use, in particular nature areas
- Waste minimization and maximum reuse
- Minimal pollution
- Minimization of risks and uncertainties (precautionary principle)
- Minimization of mobility
- Safeguarding bio-diversity
- Use of "Best Available Technology" (Better, more) mitigation measures
- Compensation
- Cancellation of project

VIII: SPECIFIC DECISIONS B: ACCEPTANCE
- Absence or lessening of controversy if no suppression of controversy

IX: MORE GENERAL DECISIONS AND ACTIVITIES
- Improved monitoring and basic research
- Improved planning
- New legislation
- Development of new technologies

3.5 Linking EA procedure and context (Leu, Williams and Bark, 1996)

In section 1.3 above, the fourth contextual dimension of EA was identified. This is considered in Chapter 6 with regard to SEA specifically, where criteria are developed to evaluate the importance it plays in effectiveness. It is argued that in the absence of certain key contextual aspects, (notably the framework of democratic government and sustainable development), the effectiveness of SEA will be undermined.

The contexts are also important with regard to EA, and it has been seen in the discussion above that an environmental policy context plays an important part in the effectiveness of EA. Without this, EA will not be integrated and coordinated with other environmental policy instruments. Sustainable development is the objective of both EA and SEA, so the EA

principles and criteria above also recognise the importance of integrating environment, economy and society, (where integration in the EIS is an important element); and employing the precautionary principle, (which is demonstrated in the need for early assessment). The purpose of this section is to describe a method of evaluating EA which gives some consideration to these aspects.

The EIA Evaluation Model below is the most comprehensive attempt to combine procedural and contextual principles produced to date and includes a range of domestic and international criteria which may be used to evaluate the system of any country, each of which is closely interrelated. Domestic factors include: national environmental policies, regulations and guidelines; an environmental administrative framework; an EA procedure; the role of actors involved; compliance monitoring and enforcement; implementation; and the availability of resources. International factors include: the role of international donor agencies; international environmental Non-Governmental Agencies (NGOs); the role of bilateral/regional cooperation; international conventions; international criticisms and pressures; and global environmental issues.

International factors have an influence upon the development of both EA and SEA, and a number have been mentioned in the thesis. These include: the role of the IAIA International Study, which was strongly supported by the Netherlands and Canada in coordinating process development through the dissemination of information; the role of the CEC in harmonising procedural requirements across the EU and sponsoring research and development; the role of the UNECE and UNEP in providing guidance; the role of the Nordic Council in sharing experiences in the Nordic region; and the role of the Transboundary Convention, which is of particular interest to northern countries such as Finland. Other factors include the role of lending institutions such as the World Bank and the UNEP, both of which have been instrumental in capacity building in the developing world.

International factors are mentioned in the thesis where appropriate, although most SEA contextual issues discussed in Chapter 6 focus upon domestic concerns. While this is appropriate, it is important to emphasise that there are many challenges faced by nations, which differ greatly between each. These include: resource depletion, poverty, overconsumption, damage to eco-system function, and economic and

political inequities. International issues are also applicable to EA and others are included in the Evaluation Model (Table 5.5); these are the influence of environmental policy, and the role of social, political and economic factors. Each of the procedural aspects in the Model have been considered above.

Table 5.5: EIA Evaluation Model (Leu et al, 1996)

(i) Environmental Policies, Regulations and Guidelines

1. Does EIA implementation have a secure legal basis?
- a. implemented through primary legislation
- b. implemented through administrative arrangements
- c. implemented retrospectively
- d. for appeal and dispute settlement
- e. for compliance monitoring and enforcement
- f. for strategic environmental assessment

2. Does the scope of the EIS formally include the following requirements?
- a. defined formal format and contents
- b. alternatives and no action strategy
- c. cultural, social, and economic issues
- d. impact mitigation measures
- e. environmental management and monitoring plans
- f. non-technical summary

3. Does the core environmental agency produce a complete set of EIA guidelines?
- a. technical guidelines for various types of development
- b. for the EIA procedure (eg screening, scoping)
- c. for EIA report preparation
- d. for EIA review
- e. for appeal
- f. for EIA compliance monitoring and enforcement
- g. for strategic environmental assessment

4. Do the EIA guidelines of donor agencies affect the development of the national EIA regulations?

5. Has the national EIA practice been influenced by international conventions?

6. Is the development of the national EIA regulations influenced by regional agreements?

(ii) Administrative Framework

1. Is there a core environmental agency responsible for the development and management of the EIA system?

2. To what extent is EIA centralized/decentralized?#
- a. the core environmental agency
- b. various central agencies
- c. the core environmental agency and local authorities
- d. various central agencies and local authorities

3. To what extent are interagency coordination mechanisms for EIA implementation in place?
- a. formal mechanisms established
- b. EIA management units set up in participating agencies
- c. integration of interagency participation by the core environmental agency

4. Are the EIA review authorities independent from the project proponents (authorized authorities)?

5. Has the development of the core environmental agency benefited from international assistance?

(iii) EIA Procedure

1. Are the following steps formally included in the EIA procedure?
- a. screening process
- b. scoping meeting and site visit
- c. a formal mechanism for independent EIA review
- d. the proponent responds to the various representations and makes those responses public
- e. the proponent revises the EIA report, based on the comments to produce the final EIA report
- f. publicity of the EIA decisions and results
- g. the EIA review bodies have a veto power over the decision-making
- h. formal mechanisms for appeals and dispute settlement
- I. clear time limit for each step of the EIA procedure

2. Do the public have the following formal channels to participate in the EIA procedure?
- a. prior to the EIA study (ie scoping, public presentation)
- b. during the EIA study
- c. after the EIA study (formal mechanisms for public notification and inspection)
- d. access to the EIA reports
- e. public hearing held
- f. to be involved in EIA review
- g. to be involved in decision-making

3. Is the national EIA procedure affected by the requirements of international donor agencies?

(iv) Role of Actors Involved

1. Have the necessary roles and responsibilities been defined and have appropriate actors been allocated to perform these tasks been arranged?

a. independent EIA review bodies organized by the responsible agencies
b. mandatory requirements for consultation with statutory consultees
c. involvement of a supreme authority to resolve appeals regarding the legal and/or administrative process of EIA

2. Is there involvement of international donor agencies in domestic EIA cases

(v) Compliance Monitoring and Enforcement

1. Are there formal EIA compliance monitoring programs in place?

a. carried out by the core environmental agency
b. carried out by competent authorities
c. involvement of independent review bodies in the programs
d. submission of regular monitoring results by the proponents
e. a formal mechanism for reviewing the results of compliance monitoring
f. involvement of local communities in the program
g. access to the results of the compliance monitoring and enforcement program by the public

2. Can EIA decisions be formally enforced?

a. defined penalties/sanctions against non-compliance with EIA decisions
b. channels for public to appeal against non-compliance with EIA decisions
c. involvement of judicial agencies in EIA enforcement
d. linked with the permitting/licensing system

3. Are international donor agencies involved in the national EIA compliance monitoring/enforcement?

(vi) EIA Implementation in Practice

1. To what extent has EIA affected the project planning cycle?

a. proceed in association with feasibility study*
b. use to justify project decisions that have already been made*
c. decision-making significantly affected by the EIA results*
d. projects frequently modified as a result of EIA findings*

2. To what extent has EIA been affected by political, social, and economic factors?

a. lower priority of economic growth than that of environmental protection*
b. political factors frequently affect decisions on EIA cases*
c. the awareness and ability of the public to participate in the process*
d. influence of NGOs on EIA cases*

3. Are there opportunities to experiment and "learn by doing" in order to develop more appropriate and effective administration procedures and mechanisms?

4. Does the core environmental agency conduct a regular environmental audit of EIA reports?

5. Does the core environmental agency conduct a regular environmental audit of the EIA system?

6. Has strategic environmental assessment formally been implemented?

*7. Have the international NGOs exerted influence on domestic EIA decisions?**

*8. Has the national EIA practice been influenced by international pressures and criticisms?**

(vii) Availability of Resources

1. Is there an extensive commitment of governmental staff to implement EIA?

a. at central level*
b. at local level*
c. regular EIA training courses organized/coordinated by the core environmental agency for responsible officials
d. a database of subject experts in place, from which experts could be called upon for consultation

2. Are there adequate measures in place for upgrading human resources outside the government?

a. training courses organized by the core environmental agency are available to consultants, proponents, and NGOs
b. training courses organized by non-governmental institutions are available to consultants, proponents, and NGOs
c. a consultant registration system
d. a database of consultants established for reference
e. annual excellence awards of good EIA practice for consultants and proponents

3. Are there adequate physical resources for EIA implementation?

a. a central environmental database established
b. an EIA tracking system established
c. a central database of EIA reports established
d. regular EIA status reports or newsletter published by the core environmental agency
e. use of GIS in EIA and national/regional planning by governmental agencies
f. accessibility of the public and NGOs to the aforesaid facilities

4. Availability of international technical supports (eg advisorship, EIA training)

5. Availability of international financial supports (eg the development of EIA and facilities)

* Answers to these questions are inevitably subjective and should be viewed with caution.

Only one of the four potential answers can be given. Decentralized mechanisms can be effective, providing there is an adequate interagency coordination.

A number of criticisms may be made of the model. With regard to contextual issues, there is no mention anywhere of the environmental policy context of sustainable development, (the overriding objective of both EA, SEA and all environmental policy-making); although 'environmental policies' are mentioned in (i), this relates to whether an EIA system is implemented by law or policy, not whether there are objectives to which the system is directed. While the relationship between environmental and economic aspects is mentioned in (vi)2a, and the need to integrate cultural, social and economic issues in the EIS is cited in (i)2c, sustainable development is not specified.

Reference to other political, social and economic factors is also far too brief, limited to the influence of political factors on EA decisions, the awareness of the public to participate in the process, and the influence of NGOs. No mention is given to the type of social/political system or the planning or legal/administrative system which underlies environmental policy-making in general or the application of EA to land-use planning or legislative proposals specifically. In the latter case, mention of SEA is also limited to questions of legal application, provision of guidelines, and implementation.

Recognition of the role played by an environmental administration in (ii), the public in (vi)2c and the availability of resources in (vii) are the strengths of the Evaluation Model with regard to the influence of context. The importance of an active administration in furthering the objective of sustainable development cannot be overstated. Similarly, public participation in social/political life is essential for democratic government, and the importance of public participation in the EA process itself is set out in (iii)2. With regard to resourcing, the Model recognises that government commitment is often demonstrated through financial and staffing provision, which is often a key element in the success or failure of EA implementation. The Evaluation Model is therefore indicative of a broader range of issues which require to be addressed in any EA evaluation, and the contextual issues mentioned are discussed in greater detail in Chapter 6 with regard to SEA.

Conclusions

Evaluation has been an important part of EA since its inception, and a number of different approaches have been taken to it. Together with the evaluation of EISs, procedural evaluations have been the most common. This is because they enable a focus on compliance, which is a far easier matter than understanding substantive change. The main conclusion reached is that provided a transactive approach to evaluation is used to link the procedures in the formative approach with the objectives in the summative approach, then procedural evaluations retain their validity (sections 1.2 and 1.3).

One of the ways procedures can better consider outcomes is by incorporating decision criteria in any evaluation, to examine the influence of an assessment upon the decision-making process. Unfortunately most of the EA procedural criteria considered do not give sufficient attention to this. Together with applying sustainable development indicators to evaluate environmental change, it is important that both have a greater role (section 3). This is especially so for SEA, where the consequences of poorly assessed PPPs are likely to be greater than for projects.

Despite their limitations, an evaluation of procedures remains a useful way of analysing the effectiveness of any existing or new process. This is especially true if it is linked with an evaluation of the contexts that underlie them. It is concluded that the contexts suggested in this Chapter are potentially a very useful method for examining whether there are adequate frameworks present for introducing tools such as SEA and legislative EA. Without the presence of each context, it is extremely unlikely that either tool will prove effective (section 2). This is the approach of this thesis in evaluating the introduction of legislative EA in Canada and the Netherlands.

In the light of the above, Chapter 6 considers the development of EA and SEA procedural and contextual principles and criteria. Based upon existing principles and criteria, criteria are developed specifically for evaluating the effectiveness of legislative EA. Effectiveness evaluation is an essential part of EA in all its forms, and Chapter 6 illustrates how it has been implemented in practice around the world.

Chapter 6 – Development of Principles and Criteria

Introduction

The purpose of this chapter is to consider the EA and SEA principles and criteria that have developed to date, in order to suggest others for evaluating legislative EA procedures and the context of their operation. Most of the SEA principles derive from the EA procedural principles; criteria based upon these will be developed to compare and analyse existing SEA principles. Contextual criteria are also developed, based upon the matters discussed in the previous chapter.

The procedural principles and criteria developed for evaluating EA in Australia, Canada and internationally are examined, some of which give recognition to the influence on EA of its operational context. The SEA procedural principles and criteria are also examined, to discover the similarities between the EA and SEA principles. The objective is to enable some light to be shed on the fifth question posed in Chapter 1 of this thesis; whether it is possible to measure the procedural effectiveness of a legislative EA process by the use of principles and criteria.

EA principles and criteria include those developed by: Wood (1995), Sadler (1996), ANZECC (1991), CEPA (1994), CEARC (1988) and Gibson (1992). SEA principles and criteria include those set out by: the UNECE (1992), Sadler and Verheem (1996), Sippe (1994), the UK DoE (1991), Elling (1997) and Tonk and Verheem (1998). Each is reproduced in full, and analysed and compared thereafter.

The Chapter concludes by setting out proposed SEA procedural and contextual criteria which will be used to evaluate legislative EA in Canada and the Netherlands. These are derived from the principles and criteria reproduced, and aim to include the most important matters which should be found within any system of SEA. The intention is to show that without understanding how procedures operate within social/political, environmental/economic, and legal/administrative contexts, it is unlikely that legislative EA will contribute to sustainable development.

1. EA procedural principles and criteria

With NEPA being the driving force behind both the development of EA and its evaluation, it is appropriate that the US Council on Environmental Quality (CEQ) has recently released the results of a three year review into its effectiveness.[1] The report identifies five key elements: strategic planning, public information and input, interagency coordination, an interdisciplinary place-based approach to decision-making, and science-based, flexible management approaches.[2] It was supplemented by a survey of academics, which highlighted five areas needing improvement: follow-up, cumulative impact assessment, capacity building, earlier issue consideration, and integrated consideration.[3] Socio-political and institutional contexts are therefore recognised in both reports, as is the need for more strategic levels of decision-making to be addressed.

The purpose of this section is to consider the principles and criteria of a number of well known process evaluations in Australia, Canada and internationally; this is in order that they may be compared, analysed and assist with the development of the SEA principles and criteria. The following are some of the better known studies and they are cited because they are based on objectives, they include requirements for SEA, and they emphasise contextual issues. Some also make reference to substantive issues of change, although these are unfortunately not common.

1.1 International

a. 'EIA System Evaluation Criteria' (Wood, 1995)

In considering how to evaluate EA systems globally fourteen criteria are outlined by Wood, the majority procedural. However the application of EA to policies, plans and programmes is included,[4] and the penultimate

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1 Council on Environmental Quality, 1997. *The National Environmental Policy Act: a Study of its Effectiveness After Twenty-Five Years, CEQ*: Washington DC. Note the earlier work of Renwick, W, 1988. 'The Eclipse of NEPA as Environmental Policy', 12(3) *Environmental Management*, pp 267-272, which suggests that NEPA has been overtaken by other environmental policy tools in the contribution to environmental protection.

2 Based upon NEPA's provisions, 'Principles of Quality' have recently been devised to enable evaluation of NEPA-type EA process stages, see Raff, M, 1997. "Ten Principles of Quality in Environmental Impact Assessment", 14(3) *Environmental and Planning Law Journal.*

3 Canter, L, and Clark, R, 1997. 'NEPA Effectiveness - A Survey of Academics', 17 *Environmental Impact Assessment Review*, pp 313-327.

4 Wood, C, 1995. *Environmental Impact Assessment: A Comparative Review*, Longman, Harlow, p 12.

criterion considers the overall advantages of EA in society, and whether the economic costs are outweighed by its environmental benefits. These are set out in Table 6.1 below, and in Table 6.2 they are applied in a matrix to eight jurisdictions to assess and compare compliance. The use of a matrix is suggested as an appropriate evaluation method, and is also used by Leu et al (see Chapter 5, section 3.5), and Sippe (see section 2.2). A matrix is also used to examine the inclusion of various criteria in EA procedural principles developed to date (see section 1.4), and in SEA procedural principles (see section 2.4). Finally, a matrix is used to evaluate the application of legislative EA in Canada and the Netherlands (see Chapters 7 and 8).

Table 6.1: EIA System Evaluation Criteria (Wood, 1995)

1.	Is the EIA system based on clear and specific legal provisions?
2.	Must the relevant environmental impacts of all significant actions be assessed?
3.	Must evidence of the consideration, by the proponent, of the environmental impacts of reasonable alternative actions be demonstrated in the EIA process?
4.	Must screening of actions for environmental significance take place?
5.	Must scoping of the environmental impacts of actions take place and specific guidelines be produced?
6.	Must EIA reports meet prescribed content requirements and do checks to prevent the release of inadequate EIA reports exist?
7.	Must EIA reports be publicly reviewed and the proponent respond to the points raised?
8.	Must the findings of the EIA report and the review be a central determinant of the decision on the action?
9.	Must monitoring of action impacts be undertaken and is it linked to the earlier stages of the EIA process?
10.	Must the mitigation of action impacts be considered at the various stages of the EIA process?
11.	Must consultation and participation take place prior to, and following, EIA report publication?
12.	Must the EIA system be monitored and, if necessary, be amended to incorporate feedback from experience?
13.	Are the financial costs and time requirements of the EIA system acceptable to those involved and are they believed to be outweighed by discernible environmental benefits?
14.	Does the EIA system apply to significant programmes, plans and policies, as well as to projects?

Table 6.2: EIA System Evaluation Criteria as Applied (based on Wood, 1995)

	Criterion Met Within Jurisdiction							
Evaluation Criteria	*USA*	*California*	*UK*	*Nether-lands*	*Canada*	*Australia*	*Western Australia*	*New Zealand*
Legal basis	yes	yes	yes	yes	yes	yes	yes	yes
Coverage	partially	yes	partially	yes	no	partially	yes	yes
Alternatives	yes	yes	no	yes	yes	yes	yes	yes
Screening	yes	yes	yes	yes	yes	no	Yes	yes
Scoping	yes	yes	no	yes	yes	yes	yes	partially
EIS Content	yes	yes	partially	yes	yes	yes	yes	no
EIS Review	yes	yes	partially	yes	yes	yes	yes	yes
Decision-making	no	no	no	yes	no	no	yes	no
Impact monitoring	no	partially	no	partially	partially	no	yes	no
Mitigation	yes	yes	yes	yes	yes	yes	yes	yes
Consultation /participation	yes	yes	partially	yes	partially	partially	yes	partially
System monitoring	yes	no	no	yes	yes	no	yes	no
Costs and benefits	yes	yes	Yes	yes	yes	yes	yes	yes
SEA	yes	yes	no	yes	no	no	yes	yes

b. 'Principles for the Design and Development of Effective EA Processes' (Sadler, 1996)

More recently, 'Principles for the Design and Development of Effective EA Processes' were developed by the International Study and contained within the Final Report.[5] Based on an agreed framework,[6] they followed the release of an Interim Report and Discussion Paper which related effectiveness with SEA.[7] Set out below as Table 6.3, the contribution of EA to decision-making and environmental protection, together with the importance of an institutional context, are highlighted.[8] While objectives are distinguished in the Final Report, they can also be seen to flow

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5 Sadler, B, 1996. *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance, Final Report*, International Study of the Effectiveness of Environmental Assessment, International Association for Impact Assessment/Canadian Environmental Assessment Agency - the 'Final Report', p 22.

6 Sadler, B, 1994. *International Study of the Effectiveness of Environmental Assessment, Proposed Framework*, FEARO/IAIA, p 14.

7 Sadler, B, 1995. *International Study of the Effectiveness of Environmental Assessment, EA: Towards Improved Effectiveness, Interim Report and Discussion Paper*, CEAA/IAIA, p 8.

8 Op cit n 5, pp 59 and 60.

throughout the principles concerning: consistency of application and participation requirements.[9]

Table 6.3: Principles for the Design and Development of Effective EA Processes (Sadler, 1996)

1)	***clear mandate and provisions***: vested in law, have specific, enforceable requirements, and prescribe the responsibilities and obligations of proponents and other parties
2)	***explicit goals and objectives***: a clear purpose and dedication to achieving environmental protection and/or sustainable development
3)	***uniform, consistent application***: automatically applied to all proposals and actions with potential environmental effects and consequences
4)	***appropriate level of assessment***: scaled to the degree of environmental significance and extent of public concerns associated with a proposal
5)	***relevant scope of consideration***: examine all pertinent environmental options to and aspects of a proposal, including cumulative effects, interrelated socio-economic, cultural and health factors, and sustainability implications
6)	***flexible, problem-solving approach***: adapted to deal with a range of proposals, issues, and decision-making situations
7)	***open-facilitative procedures***: transparent and readily accessible, with a traceable record of assessment decisions and timely opportunities for public involvement and input at key stages
8)	***necessary support and guidance***: requisite level of resources and procedural guidance for conducting assessments in accordance with requirements, principles and standards of good practice
9)	***"best practice" standards***: undertaken with professionalism, objectivity and credibility, as identified by "best practices" in impact science, public consultation and process administration
10)	***efficient, predictable implementation***: applied in a timely manner that fosters certainty, minimizes delay and avoids unnecessary burdens on proponents
11)	***decision-oriented***: provide sound, tested practical information that is readily usable in planning and decision making
12)	***related to condition-setting***: explicitly linked to approvals and, as necessary, to specified terms and conditions
13)	***follow-up and feedback in-built mechanisms***: explicit measures for checking on compliance with conditions, monitoring effects, managing impacts, and auditing and evaluative performance
14)	***cost-effective outcomes***: promote actions that ensure environmental protection at least cost to society

A 'Checklist for Review of EA Process Effectiveness' forms part of the approach. This is divided into four steps to enable consideration of either a comprehensive process review, or a review of specific aspects. Ratings may be given to specific questions asked in each step. Step 1 looks at aspects of the process generally, Step 2 asks questions related to procedural stages, Step 3 considers the relevance of decision-making, and Step 4 examines the overall results of effectiveness.

9 Op cit n 5, p 22

Step 1 includes: a legal framework, a specific requirement for significance, a broad definition of environment, opportunities for public involvement, procedures for independent review, guidance on application of procedures, a visible linkage with decision-making, and specification of terms and conditions for implementation. Step 2 includes: screening, scoping, impact analysis, mitigation, significance, EIS, and review. There is clearly overlap between some of these in Step 2 and also between Steps 1 and 2, screening in particular. This illustrates the confusion that exists regarding the distinction between EA process and procedure.[10]

1.2 Australia

a. 'National Principles of EIA' (Australian and New Zealand Environment and Conservation Council – ANZECC, 1991)

In Australia, the Australian and New Zealand Environment and Conservation Council's (ANZECC) National Principles of EIA[11] were intended to promote principles of common application to all Australian jurisdictions. Concerns regarding uncertainty, delay and environmental effectiveness of outcomes had been raised in reviews prior to ANZECC's study; the timing of the study was particularly appropriate, as the opportunity was presented to recognise the connections between EA and sustainable development, an emerging government priority at the time.[12]

Clear objectives of the review were laid down in advance, with which the principles were to comply. These included: improving the EA process by reducing uncertainty, promoting public participation, improving consistency and avoiding duplication across jurisdictions, and identifying and apportioning responsibilities among participants. Divided between Principles for Assessing Authorities, Proponents, Public and Government, these are set out as Tables 6.4-6.7 below; as with the other criteria in the tables that follow, these are compared and contrasted in section 1.4. The ANZECC 'Principles for Government' emphasise the importance of an environmental policy framework for EA, and include reference to the substantive issue of basing decisions upon advice resulting from the

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10 There is still no clear distinction here, but it would be helpful if there were. See Chapter 5.

11 Australian and New Zealand Environment and Conservation Council, 1991. *A National Approach to EIA in Australia*, ANZECC: Canberra, pp 4-9.

12 Commonwealth of Australia, 1990. *Ecologically Sustainable Development: A Discussion Paper*, AGPS: Canberra.

process if adverse effects are likely. Application of the Principles to PPPs is also set out and advocated elsewhere in the document.[13]

Table 6.4: Principles for Assessing Authorities (ANZECC, 1991)

(a)	Provide clear guidance on types of proposal likely to attract environmental impact assessment and on levels of guidance.
(b)	Provide proposal-specific guidelines (or a procedure for their generation) focussed on key issues and incorporating public concerns; and a clear outline of the EIA process. Amendments to guidelines should only be based on significant issues that arise after guidelines have been adopted.
(c)	Provide guidance to all participants in the EIA process on criteria for environmental acceptability of potential impacts including such things as the principles of ecologically sustainable development, maintenance of environmental health, relevant local and national standards and guidelines, codes of practice and regulations.
(d)	Negotiate with key participants to set an assessment timetable on a proposal-specific basis and commit to using best endeavours to meet it.
(e)	Seek and promote public participation throughout the process, with techniques and mechanisms tailored appropriately to specific proposals and specific publics.
(f)	Ensure that the total and cumulative effects of using or altering community environmental assets (for example air, water, amenity) receive explicit consideration.
(g)	Report publicly on the assessment of proposals.
(h)	Ensure predicted environmental impacts are monitored, the results assessed by a nominated responsible authority and feedback provided to improve continuing environmental management of proposals.
(i)	Monitor properly the efficiency and effectiveness of the environmental impact assessment process to learn from the past, streamline requirements and help maintain consistency.
(j)	Review, adapt and implement techniques and mechanisms which can improve the process and minimise uncertainties and delays.
(k)	Ensure that educational opportunities inherent in the EIA process are actively pursued.

Table 6.5: Principles for Proponents (ANZECC, 1991)

(a)	Take responsibility for preparing the case required for assessment of a proposal.
(b)	Consult the assessing authority and the community as early as possible.
(c)	Incorporate environmental factors fully into proposal planning, including a proper examination of reasonable alternatives.
(d)	Agree on a proposal-specific evaluation timetable and commit to using best endeavours to meet it.
(e)	Take the opportunity offered by the EIA process to improve the proposal environmentally.
(f)	Make commitments to avoid where possible and otherwise minimise, ameliorate, monitor and manage environmental impacts; and implement these commitments.
(g)	Amend environmental management practices responsibly, following provision and dissemination of environmental monitoring results.
(h)	Identify and implement responsible corporate environmental policies, strategies and management practices, with periodic review.

13 Op cit n 11, p 9. See also Court, J, and Associates Pty Ltd and Guthrie Consulting, 1994. *Assessment of Cumulative Impacts and Strategic Assessment in Environmental Impact Assessment*, Commonwealth of Australia.

Table 6.6: Principles for the Public (ANZECC, 1991)

(a)	Participate in the evaluation of proposals through offering advice, expressing opinions, providing local knowledge, proposing alternatives and commenting on how a proposal might be changed to better protect the environment.
(b)	Become involved in the early stage of the process as that is the most effective and efficient time to raise concerns. Participate in associated and earlier policy, programme and planning activities as appropriate, since these influence the development and evaluation of proposals.
(c)	Become informed and involved in the administration and outcomes of the environmental impact assessment process, including: • assessment reports of the assessing authority • policies determined, approvals given and conditions set • monitoring and compliance activities • environmental advice and reasons for acceptance or rejection by decision-makers.
(d)	Take a responsible approach to opportunities for public participation in the EIA process, including the seeking out of objective information about issues of concern.

Table 6.7: Principles for Government (ANZECC, 1991)

(a)	Provide policy and planning frameworks which set contexts for the environmental assessment of proposals.
(b)	Base decisions on proposals having potentially significant environmental impact on advice resulting from the EIA process and include provisions for effective protection and management of the environment.
(c)	Apply the EIA process equally to proposals from both the public and private sectors.
(d)	Within each jurisdiction (Commonwealth, State/Territory) provide for a coordinated government decision-making process to which the outcomes of EIA can be directed; and develop mechanisms to synchronize processes for decision-making such that, where possible, the opportunity exists for decisions to be made in parallel rather than sequentially for proposals requiring multiple approvals.
(e)	Ensure assessment reports are available to the public before or at the time of decision-making.
(f)	Establish one national agreement to ensure a single orderly process is in place where the EIA responsibilities of several governments are involved.
(g)	Provide support, if and when appropriate, to participants in the process to enable better and informed involvement.
(h)	Provide opportunities for reasonable public and proponent objections, on decisions made other than at Ministerial level, regarding the requirement for and level of assessment, adherence to due process, and environmental advice given to decision-makers.
(i)	Implement this national approach including, where appropriate, progressive amendment of statutory provisions, to increase consistency in the process.
(j)	Maintain the integrity of the EIA process.

b. 'Schedule 3 (Principles) - Environmental Impact Assessment' (Intergovernmental Agreement on the Environment, 1992)

In 1992 the Intergovernmental Agreement on the Environment (IGAE) made specific reference to EA in a schedule to the Agreement. The principles are largely derived from the ANZECC principles above; these are duplicated in four sections, indicating the importance attached to them by each of the Australian jurisdictions.

Table 6.8: Schedule 3 (Principles) - Environmental Impact Assessment (IGAE, 1992)

1. The parties agree that it is desirable to establish certainty about the application, procedures and function of the environmental impact assessment process, to improve the consistency of the approach applied by all levels of Government, to avoid duplication of process where more than one Government or level of Government is involved and interested in the subject matter of an assessment and to avoid delays in the process.
2. The parties agree that impact assessment in relation to a project, program or policy should include, where appropriate, assessment of environmental, cultural, economic, social and health factors.
3. The parties agree that all levels of Government will ensure that their environmental impact assessment processes are based on the following:
   - (i) the environmental impact assessment process will be applied to proposals from both public and private sectors;
   - (ii) assessing authorities will provide information to give clear guidance on the types of proposals likely to attract environmental impact assessment and on the level of assessment required;
   - (iii) assessing authorities will provide all participants in the process with guidance on the criteria for environmental acceptability of potential impacts including the concept of ecologically sustainable development, maintenance of human health, relevant local and national standards and guidelines, protocols, codes of practice and regulations;
   - (iv) assessing authorities will provide proposal specific guidelines or a procedure for their generation focussed on key issues and incorporating public concern together with a clear outline of the process;
   - (v) following the establishment of specific assessment guidelines, any amendments to those guidelines will be based upon significant issues that have arisen following the adoption of those guidelines;
   - (vi) time schedules for all stages of the assessment process will be set early on a proposal specific basis, in consultations between the assessing authorities and the proponent;
   - (vii) levels of assessment will be appropriate to the degree of environmental significance and potential public interest;
   - (viii) proponents will take responsibility for preparing the case required for assessment of a proposal and for elaborating environmental issues which must be taken into account in decisions, and for protection of the environment;
   - (ix) there will be full public disclosure of all information related to a proposal and its environmental impacts, except where there are legitimate reasons for confidentiality including national security interests;
   - (x) opportunities will be provided for appropriate and adequate public consultation on environmental aspects of proposals before the assessment process is complete;
   - (xi) mechanisms will be developed to seek to resolve conflicts and disputes over issues which arise for consideration during the course of the assessment process;
   - (xii) the environmental impact assessment process will provide a basis for setting environmental conditions, and establishing environmental monitoring and management programs (including arrangements for review) and developing industry guidelines for application in specific cases.
4. A general framework agreement between the Commonwealth and the States on the administration of the environmental impact assessment process will be negotiated to avoid duplication and to ensure that proposals affecting more than one of them are assessed in accordance with agreed arrangements.

Set out above as Table 6.8, section 1 emphasises certainty, consistency, and the need to avoid duplication and delay. Section 2 highlights the need for SEA as well as EA, and for each to consider both environmental, economic and social factors in an integrated way. Section 3 indicates the importance of many aspects of process and procedure, including: the context of ecologically sustainable development (ESD), screening and scoping, timeframes and responsibilities, participation, documentation and

dispute resolution, and monitoring. Finally, section 4 indicates the need for a national agreement on EA to be negotiated between the Commonwealth and the States and Territories, to avoid duplication through accrediting each others process.

c. 'Guiding Principles for Reform' (Commonwealth Environmental Protection Agency – CEPA, 1994)

The Commonwealth Environment Protection Agency, (now the Department of Environmental Protection, Environment Australia) Guiding Principles for Reform[14] are also helpful, and are set out below as Table 6.9. The concern of both ANZECC and the EPA was for a better national process guided by specific objectives, with the development of EA to be based on protection and management of the environment. Yet despite forthright recommendations, a change of government has resulted in less enthusiasm for a dynamic, forward-looking process. Emphasis is increasingly on devolution of environmental responsibilities to the States and Territories, many of which are lacking in aspects of the EA process recommended by the review.[15]

Table 6.9: Guiding Principles for Reform (CEPA, 1994)

The Commonwealth environmental impact assessment process should:

- provide real opportunities for public participation in government decision making;
- be open and transparent;
- provide certainty of application and process to all participants, including the community, governments, industry and project proponents;
- provide accountable decision making;
- be administered with integrity and professionalism;
- provide cost-effective processes and outcomes;
- be flexible enough to deal effectively and efficiently with all proposals assessed; and
- ensure practical outcomes for effective environmental protection

14 Commonwealth Environment Protection Agency, 1994. *Public Review of the Commonwealth EIA Process,* Commonwealth of Australia: Canberra, pp ii-iii Executive Summary.

15 Environment Australia, 1998. *Reform of Commonwealth Environmental Legislation: A Discussion Paper.*

1.3 Canada

a. 'Key Criteria For Evaluating EIA' (Canadian Environmental Assessment Research Council – CEARC, 1988)

In Canada, CEARC's interest in EA evaluation has been longstanding,[16] and the criteria set out in its 'Action Prospectus'[17] are frequently cited by other effectiveness studies. Set out below as Table 6.10, these are divided between criteria which promote effectiveness, efficiency and fairness. They highlight the contribution of EA to decision-making, the achievement of environmental management objectives, the relationship of environmental, social and economic aspects, and participation. As such, some of the criteria deal with substantive issues, especially in the achievement of objectives, but also the contribution to decision-making, if decisions are taken based upon the information generated in the assessment. CEARC also recognises the importance of a broad application of EA to 'legislative proposals, policies, programs, projects and operational procedures'.

Table 6.10: Key Criteria for Evaluating EIA (CEARC, 1988)

An EIA may be considered ***effective*** if, for example:

- information generated in the EIA contributed to decision making;
- predictions of the effectiveness of impact management measures were accurate; and
- proposed mitigatory and compensatory measures achieved approved management objectives

Efficiency criteria are satisfied if, for example:

- EIA decisions are timely relative to economic and other factors that determine project decisions; and
- costs of conducting EIA and managing inputs during project implementation can be determined and are reasonable.

Fairness criteria are satisfied if, for example:

- all interested parties (stakeholders) have equal opportunity to influence the decision before it is made; and
- people directly affected by projects have equal access to compensation

16 It commissioned the earlier report by Munro et al; see Munro, D, Bryant, T, and Matte-Baker, A, 1986. *Learning From Experience: A State of the Art Review and Evaluation of Environmental Impact Assessment Audits*, CEARC, Hull.

17 Canadian Environmental Assessment Research Council, 1988. *Evaluating EIA: An Action Prospectus*, CEARC, Hull.

b. *'Eight Basic Principles for Evaluating EIA Processes' (Gibson, 1992)*

Gibson has developed eight basic principles for evaluating EA processes, which emphasise sustainability, integration, coordination, participation, monitoring and a legal basis.[18] These are set out below as Table 6.11. He also recognises the importance of applying EA to PPPs during EA design, and believes that this should be required through specific, mandatory and enforceable requirements in the same way as for other EA applications.

Table 6.11: Eight Basic Principles for Evaluating EIA Processes (Gibson, 1992)

1.	An effective environmental assessment process must encourage an integrated approach to the broad range of environmental considerations and be dedicated to achieving and maintaining local, national and global sustainability.
2.	Assessment requirements must apply clearly and automatically to planning and decision making on all undertakings that may have environmentally significant effects and implications for sustainability within or outside the legislating jurisdiction.
3.	Environmental assessment decision making must be aimed at identifying best options, rather than merely acceptable proposals. It must therefore require critical examination of purposes and comparative evaluation of alternatives.
4.	Assessment requirements must be established in law and must be specific, mandatory and enforceable.
5.	Assessment work and decision making must be open, participative and fair.
6.	Terms and conditions of approvals must be enforceable, and approvals must be followed by monitoring of effects and enforcement of compliance in implementation.
7.	The environmental assessment process must be designed to facilitate efficient implementation.
8.	The process must include provisions for linking assessment work into a larger regime including the setting of overall biophysical and socio-economic objectives and the management and regulation of existing as well as proposed new activities.

c. *'Ten Key Attributes of Effectiveness' (Doyle and Sadler, 1996)*

Ten key attributes of effectiveness for Canadian EA systems have been developed by Doyle and Sadler to assess federal, provincial and territorial EA systems. These are set out below as Table 6.12.[19] The authors believe that clear purpose and goals should be set out in legislation; that a holistic, integrative aspect is essential; and that EA should be applied to strategic

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18 Gibson, R, 1992. 'Environmental Assessment Design: Lessons From the Canadian Experience', 15 *The Environmental Professional*, pp 12-24.

19 Doyle, D, and Sadler, B, 1996. *Environmental Assessment in Canada: Frameworks, Procedures and Attributes of Effectiveness*, A Report in Support of the International Study of the Effectiveness of Environmental Assessment, Minister of Supply and Services Canada, pp 23-33. These are based upon the other criteria outlined above and below.

levels wherever possible. Broad, interactive participation is encouraged, as are harmonisation agreements with other jurisdictions. A comprehensive approach to compliance monitoring is recognised; specific, fixed, detailed timelines and schedules acknowledged; and the importance of a dynamic process that responds to change and expectations understood. Finally, any process must be cost effective, and meet sustainability goals if substantive change is to be achieved.

Table 6.12: Attributes of Effectiveness (based on Doyle and Sadler, 1996)

1. Clear purpose and goals/direction
2. Incorporates long-term and overall perspective
3. Broad scope of application
4. Responsive to public/stakeholder involvement
5. Interjurisdictional harmonization
6. Monitors results and responds
7. Certainty of decision-making
8. Living process
9. Provides value for money
10. Achieves environmental sustainability

1.4 Comparisons

The EA procedural principles set out in Tables 6.1-6.12 (excluding the matrix in Table 6.2), are compared in a matrix below in order that similarities and differences may become more apparent. Table 6.13 has therefore been compiled to consider each set of principles against a combination of criteria derived from them all.

One thing that can be noted generally is that there is no clear distinction between the terms 'principles' and 'criteria' set out in the tables and accompanying text. Only CEARC and Wood use the word 'criteria', and only in Wood's Table 6.1 (and in Hollick's Table 5.3) are the criteria presented in the form of a question; the majority of the others prefer the term 'principles', Doyle and Sadler (with 'attributes of effectiveness') being the exception. For consistency, principles and criteria are distinguished in Table 6.13, with principles referring to the set of indicators as a whole, and criteria referring to each attribute.

\# Denotes the attribute appears in the ANZECC Table or Tables as numbered.

* Denotes the attribute appears in the *Action Prospectus.*

Table 6.13: A Comparison of EA Procedural Principles

	Principles						
Criteria	Sadler (1996)	ANZEEC/ IGAE (91/92)	EPA (1994)	CEARC (1988)	Gibson (1993)	Doyle/Sadler (1996)	Wood (1995)
1. environmental policy context?	yes	yes # 4 and 6	no	yes *	yes	yes	no
2. objectives clearly defined?	yes	yes # 6	yes	yes *	yes	yes	no
3. provisions in law or policy?	yes	yes # 6	yes	no	yes	yes	yes
4. support and guidance?	yes	yes # 3 and 6	no	yes *	no	no	yes
5. self assessment?	no	yes # 4	no	no	no	no	no
6. environment considered during proposal formulation?	no	yes # 4 and 5	no	no	no	no	no
7. assessment proportionate to significance?	yes	no	no	no	yes	no	yes
8. terms of reference clear?	no	yes # 3	yes	no	yes	no	no
9. timetable outlined?	no	yes # 3 and 4	no	no	no	yes	no
10. applies to socio-economic effects?	yes	no	no	yes *	yes	no	no
11. applies to cumulative/ indirect effects?	yes	yes # 3	no	yes *	yes	no	no
12. applies to policies, plans and programs?	no	yes # 5	no	yes *	yes	yes	Yes
13. applies to public/private proposals?	yes	yes # 6	no	no	yes	no	no
14. need considered?	no	no	no	yes *	yes	yes	no
15. alternatives considered?	yes	yes # 4 and 5	no	yes *	yes	yes	yes
16. consistent application?	yes	yes # 6	yes	no	yes	no	no
17. flexible application?	yes	no	yes	no	no	no	no
18. clear responsibilities of participants?	yes	yes All	yes	no	no	no	no
19. public participation?	yes	yes # 3, 4 and 6	yes	yes	yes	yes	yes
20. EIS public?	yes	yes # 3, 5 and 6	yes	no	no	no	yes
21. decision oriented?	yes	yes # 4 and 5	yes	yes	yes	yes	yes
22. external review?	no	yes # 3	no	yes *	no	no	yes
23. mitigation?	yes	yes # 4 and 5	no	yes	yes	no	yes
24. monitoring?	yes	yes # 3 and 5	no	yes *	yes	yes	yes, incl. system
25. cost effective?	yes	yes # 3	yes	yes	no	yes	yes

Each of the principles contain at least half of the criteria within them, although they may be roughly divided into three groups. The first group consist of the ANZEEC/IGAE and Sadler principles, which contain 21 and 18 of the criteria. The Australian principles of ANZECC and those contained within the IGAE are considered together as they are the same principles, and overlap in all areas; they contain a significant amount of detail, and this would appear to be largely responsible for this compliance. The Sadler principles are based upon the Australian principles together with many of the others so this would explain the comprehensiveness of them. The second group consist of the Gibson and CEARC principles, which contain 15 and 14 of the criteria within them; the third group consist of the Wood, Doyle/Sadler and CEPA principles, which contain 12, 11 and 10 of the criteria within them.

The criteria will also be used to compare the SEA principles in section 2.4 below. While some appear to be of greater importance than others and the 25 could easily be reduced to a smaller number, it was felt prudent to retain all of them as some may be more relevant to SEA than others. The more commonly featured criteria are the requirement for an objective of sustainable development, for procedures to be laid down in law or policy, application to PPPs as well as projects, consideration of alternatives, public participation, relationship of EA with decision-making, and monitoring. These may be regarded as some of the most important of the criteria.

2. SEA procedural principles and criteria

This section will consider the SEA principles developed to date. These include those produced by the United Kingdom Department of the Environment (DoE), the United Nations Economic Commission for Europe (UNECE), Sippe, Sadler and Verheem, Elling, and Tonk and Verheem. These are duplicated below as Tables 6.14, 6.15, 6.16, 6.18, 6.19 and 6.20 and compared and analysed in Table 6.21, a matrix which indicates overlap between each.

2.1 International

a. 'SEA Procedural Steps' (United Nations Economic Commission for Europe Task Force – UNECE, 1992)[20]

The UNECE recommended that SEA procedures should reflect those of EA as much as possible.[21] Table 6.14 below summarises these 'SEA Procedural Steps'; Sadler and Verheem believe they can be used as 'a generic checklist of the extent to which EIA procedure is followed in SEA.'[22] The steps are broad in application, with most of them included in existing SEA systems. The relationship between the UK and UNECE guidance is highlighted by Sadler and Verheem, who cite the flexibility of the UK approach and state: '[a]lthough not a formal standard framework, it overlaps and incorporates the application of screening, scoping and other EIA procedures recommended by the UNECE Task Force.'[23]

Table 6.14: SEA Procedural Steps (UNECE Task Force, 1992)

Initiation:
determine the need for and type of SEA, by means of a list, a screening mechanism or both.

Scoping:
identify alternatives and impacts to be assessed, exclude irrelevant information.

Outside review:
seek input and advice of other governmental agencies, independent experts, interest groups and the public during scoping and after completion of the SEA.

Public participation:
involve the public in the SEA process, unless limited by legitimate confidentiality or timing requirements.

Documentation:
present the information, either in a separate document or a chapter or paragraph of the policy proposal.

Decision making:
take SEA conclusions and recommendations into account.

Post decision:
identify follow up measures of overall impact of projects and measures resulting from the policy, plan or programme.

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20 The UNECE 'SEA Procedural Steps' are taken from Sadler and Verheem, 1996. *Strategic Environmental Assessment: Status, Challenges and Future Directions*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer - the 'SEA Report', p 106, which has summarised them in the tabular form presented.

21 United Nations Economic Commission for Europe, 1992. *Application of EIA Principles to Policies, Plans and Programmes*, UNECE: Geneva.

22 Sadler, B, and Verheem, R, 1996. *Strategic Environmental Assessment: Status, Challenges and Future Directions*, Ministry of Housing, Spatial Planning and the Environment, Zoetermeer, p 105.

23 Op cit n 22, p 106.

b. *'Principles of SEA' (Sadler and Verheem, 1996)*[24]

The 'Principles of SEA' constitute one of the more recent, and possibly best available principles to date. Developed as part of the International Study into the Effectiveness of EA, these are set out below as Table 6.15. Most of the principles are included in the other tables above, and they may therefore be seen as a comprehensive guide to SEA procedure. Given the widespread circulation of the Study's Final and SEA Reports, most EA and SEA practitioners should by now be reasonably familiar with their content.[25]

The Principles recognise the importance of traditional EA procedure, albeit as applied flexibly. Provision is made for: a policy context to guide assessment, self-assessment as early as possible in proposal design, consideration of alternatives, assessment proportionate to significance, public reporting and involvement, and independent review and monitoring. However given confidentiality concerns, limitations on reporting and participation are acknowledged. This remains a real difficulty. Although the Principles do not require rigid adherence to formal EA stages such as screening, scoping, report production, review, decision-/policy-making and monitoring, they at least include these stages in full.

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24 Op cit n 22, p 79. Note that these have changed slightly from their original presentation in the Final Report; see the 'Final Report', op cit n 5, p 151.

25 The principles have been used to evaluate the same Canadian examples that appear in Chapter 7. See Marsden, S, 1998. 'Why is Legislative EA in Canada Ineffective, and How Can it be Enhanced', 18(3) *Environmental Impact Assessment Review*, pp 241-265.

Table 6.15: Principles of SEA (Sadler and Verheem, 1996)

The following principles appear to be widely supported:

- *initiating agencies are accountable* for assessing the environmental effects of new or amended policies, plans and programmes;
- the assessment process should be *applied as early as possible* in proposal design;
- *scope of assessment must be commensurate* with the proposal's potential impact or consequence for the environment;
- *objectives and terms of reference* should be clearly defined;
- *alternatives* to, as well as the *environmental effects* of, a proposal should be considered;
- *other factors,* including socio-economic considerations, to be included as necessary and appropriate;
- evaluation of *significance* and determination of *acceptability* to be made against policy framework of *environmental objectives and standards;*
- provision should be made for *public involvement,* consistent with potential degree of concern and controversy of proposal;
- *public reporting* of assessment and decisions (unless explicit, stated limitations on confidentiality are given);
- need for *independent oversight* of process implementation, agency compliance, and government-wide performance;
- SEA should result in *incorporation* of environmental factors in policy making; and
- *tiered* to other SEAs, project EIAs and/or monitoring for proposals that initiate further actions

2.2 Australia

a. 'Key Principles of EIA Relevant to the Policy Level' (Sippe, 1994)[26]

Sippe's Key Principles overlap with the UNECE Task Force's Procedural Steps, although they also provide additional principles. They are divided into two classes, basic and desirable principles, and are duplicated below as Table 6.16. They are used to consider how SEA in Western Australia accords with 'best practice'. Seven state policies are evaluated with reference to these, which fall within four general areas: conservation policy, urban and industrial development policy, resource management policy and environmental health policy. The policies are considered alongside criteria to produce a matrix indicating compliance; the conclusion reached by Sippe is encouraging, for as Table 6.17 shows, the majority of the principles are complied with in policy formulation and implementation.

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26 Sippe, R, 1994. 'Policy and EA in Western Australia: Objectives, Options, Operations and Outcomes', *Paper presented to the International Workshop on Policy EA*, The Hague.

Table 6.16: Key Principles of EIA Relevant to the Policy Level (Sippe, 1994)

	RELEVANT PRINCIPLES OF EIA
CLASS 1	(i) proponents (of policies) take primary responsibility for environmental protection (ii) objectives defined (iii) alternatives considered (iv) incorporate environmental factors in policy planning and include short and long term, direct and indirect, total and cumulative effects (v) provide for public information, participation and response mechanisms (vi) evaluate and adapt for environmental acceptability against standards, criteria, regulations, best practice etc (vii) provide basis for monitoring and adaptive management (viii) report publicly (ix) measure post-implementation performance
CLASS 2	(x) guidelines (scoping) on key issues (xi) environmental costs and benefits and where borne in the community (xii) timetables for process of assessment (xiii) independent (of proponent) evaluation

Table 6.17: Application of Key Principles of EIA to Policies in Western Australia (based on Sippe, 1994)[27]

	SCS	NCS	PFP	SDK	MNP	FMP	CAT
Class 1 (I) proponents take responsibility for environment	Y	Y	Y	N	Y	Y	N
(ii) objectives defined	Y	Y	Y	Y	Y	Y	Y
(iii) alternatives considered	N	N	Y	Y	Y	Y	Y
(iv) environmental factors in policy making	Y	Y	Y	Y	Y	Y	Y
(v) provide public information and participation role	Y	Y	Y	Y	Y	Y	Y
(vi) evaluation against standards/ criteria/ practice	Y	Y	N	Y	N	Y	Y
(vii) monitoring and adaptive management	Y	Y	Y	Y	N	Y	Y
(viii) public report on EA	N	Y	Y	Y	Y	Y	Y
(ix) measure post- implementation	N	Y	Y	Y	N	Y	N
Class 2 (x) scoping guidelines	Y	Y	Y	Y	Y	Y	Y
(xi) costs and benefits	Y	N	Y	Y	Y	Y	Y
(xii) assessment timetable	N	N	Y	N	N	Y	N
(xiii) independent evaluation	N	Y	Y	Y	Y	Y	N

SCS = State Conservation Strategy, NCS = Nature Conservation Strategy,

PFP = Planning for the Future of Perth, SDK = Sustainable Development in Kwinana,

MNP = Mining in National Parks, FMP = Forest Management Plans,

CAT = Control of Ants and Termites, Y = meets the principle, N = fails to meet the principle

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27 Note this has also been presented in a slightly different way in the SEA Report; op cit n 22, pp 91-92.

Table 6.16 may be compared with Wood's comparative table, (Table 6.2), where he considers the compliance of a number of countries with EA procedural criteria. The structure of the tables are similar, and illustrate that setting out compliance in the form of a matrix is a simple, useful method of evaluating procedural effectiveness (see Chapter 6, section 1.1a). The difference between them is that while Wood considers the effectiveness of particular countries' systems, Sippe considers the effectiveness of particular policies.

2.3 Europe

a. 'Step's in Policy Appraisal' (UK Department of the Environment, 1991)[28]

The Department of the Environment (DoE) 'Steps in Policy Appraisal' are the longest established of the principles. Although they have limitations,[29] they helpfully summarise some of the main stages of policy appraisal carried out by the UK Government, including both procedural and methodological elements.

Table 6.18: Steps in Policy Appraisal (DoE, 1991)

Summarize the policy issue: seek expert advice to augment your own knowledge as necessary.
List the objectives: give them priorities, and identify any conflicts and trade-offs between them.
Identify the constraints: indicate how binding these are, and whether they might be expected to change over time or be negotiable
Specify the options: seek a wide range of options, including the do-nothing or do minimum options; continue to look at new options as the policy develops.
Identify the costs and benefits, including the environmental impacts; do not disregard likely costs and benefits simply because they are not easily quantifiable.
Weigh up the costs and benefits, concentrating on those impacts which are material to the decision.
Test the sensitivity of the options to possible changes in conditions, or to the use of different assumptions.
Suggest the preferred option, if any, identifying the main factors affecting the choice.
Set up any monitoring necessary so that the effects of the policy may be observed, and identify any further analysis needed at project level.
Evaluate the policy at a later stage, and use the evaluation to inform future decision making.

28 UK Department of the Environment, 1991. *Policy Appraisal and the Environment*, HMSO: London, p 2. A follow-up guide is available illustrating how government departments have used the information. See UK Department of the Environment, 1994. *Environmental Appraisal in Government Departments*, HMSO: London.

29 Therivel, R, Wilson, E, Thompson, S, Heaney, D, and Pritchard, D, 1994. *Strategic Environmental Assessment*, Earthscan: London, pp 62-65 and 139-140.

Some of the main weaknesses of the approach are the lack of any reference to the goal of sustainable development, any procedure for incorporating public opinion, or opportunities for external review. The guide from which they are drawn also relies heavily on cost-benefit analysis, and there is a lack of detail given to some of the more important procedural aspects, notably consideration of objectives and alternatives.

b. *'Fundamental Principles of SEA' (Elling, 1997)*

Elling's principles were produced with legislative EA under the Danish *Administrative Order* in mind, and are set out below as Table 6.19. These are brief, and emphasise five key aspects: documentation, procedure, significance, alternatives, and public participation. Elling acknowledges that more detailed factors are also viewed as good SEA practice, but these are not included because they are not believed to be 'elementary for the characterisation of the process as an environmental assessment'.[30] However review should also be regarded as elementary. Although it is appropriate that any principle be flexible enough to take account of existing contexts, review is already an important aspect of the legislative process to which the SEA procedures in Denmark are applied, and there is no reason why it should be excluded.

Table 6.19: Fundamental Principles of SEA (Elling, 1997)

Documentation. For every environmental assessment a comprehensive document containing a statement on environmental impact is considered essential, first, as documentation of the effects adduced, second, as a pre-condition for participation by the public in an assessment, and third to provide essential information concerning the project for the decision makers. ***Procedure.*** An established procedure should exist in advance for the implementation of an environmental assessment, along with rules relating to its content. This is an important pre-condition for involving all the relevant players in the process, and at the right juncture. If no established procedure exists it will cast serious doubt on the reliability of the environmental assessment, while the decision-making process itself will run the risk of being diffuse and reversible. This will prevent any co-ordination with other decision-making processes or planning procedures, and so on. ***Significance.*** It is a fundamental principle that every likely significant effect should be examined during an environmental assessment, lest doubt be cast on its reliability. It is also inherent in this principle that interested parties outside the process should have an opportunity to make suggestions about the effects which it will be relevant to examine. ***Alternatives.*** Alternatives to the existing proposal will be critical to an examination of other courses of action which are less problematic with regard to the environment, but will also in themselves help to clarify the impact on the environment of a bill which has been presented. This will be particularly critical in the context of environmental assessment at the strategic level, since it may often be difficult to clarify environmental effects at this level, and alternatives may thus attract a particularly intermediary role. ***Public participation.*** The principle of involving the public is fundamental to environmental assessment, since it decisively emphasizes the fact that the assessment is based on technical and scientific criteria as far as these go, but it is also a pre-condition of environmental impact assessment that knowledge and sets of values and priorities should be introduced in the process, which go beyond science and technology. Public participation can contribute to this.

30 Elling, B, 1997. 'Strategic environmental assessment of national policies: the Danish experience of a full concept assessment', 12(3) *Project Appraisal*, p 162.

c. *'Generic SEA Principles' (Tonk and Verheem, 1998)*

The Tonk and Verheem principles have been produced with two very different Dutch SEA procedures in mind, the *Environmental Test* for legislative EA and the more general SEA provisions contained within the *Environmental Management Act.* These emphasise nine principles: screening, timing, scoping of environmental and other factors, review, consultation, documentation, decision-making, and monitoring. These are set out below in Table 6.20.[31]

The importance of context is recognised in the application of the principles, as participation requirements are believed to be satisfied if the legislative process to which SEA is applied permits those opportunities. The absence of an explicit principle for consideration of alternatives, together with the restriction of public involvement to consultation as opposed to participation, appear to be their greatest weaknesses. While political realities have guided their development, it must be questioned whether such attributes should be open to compromise.

Table 6.20: Generic SEA Principles (Tonk and Verheem, 1998)

An SEA process ensures that:	
Initiation	
Screening:	1 an appropriate environmental assessment is carried out for all strategic decisions with potentially significant (positive or negative) environmental consequences by the agencies initiating these decisions.
Timing:	2 the results of the assessment are available sufficiently early to be used effectively in the preparation of the strategic decision.
Scoping	
Environmental:	3 all relevant environmental information is provided - and all irrelevant information is excluded - to judge whether an initiative should go ahead or whether the objectives of the initiative could be achieved in a more environmentally friendly way.
Other factors:	4 sufficient information on other factors, including socio-economic considerations, is available, either parallel to or integrated in the assessment.
Review	5 the quality of process and information is safeguarded by an effective review mechanism.
Views of the public	6 sufficient information is available on the views of the public affected by the strategic decision early enough to be used effectively in the preparation of the strategic decision.
Documentation	7 the results of the assessment are identifiable, understandable and available to all parties affected by the decision.
Decision making	8 it is clear to all parties affected by the decision how the assessment results were taken into account when coming to a decision.
Post decision	9 sufficient information on the actual impacts of implementing the decision is gained to judge whether the decision should be amended.

31 Tonk, J, and Verheem, R, 1998. 'Integrating the environment in strategic decision making: one concept, multiple forms', *Paper presented to the Annual Conference of the International Association for Impact Assessment*, Christchurch, p 5.

2.4 Comparisons

A comparative Table 6.21 follows in the form of a matrix;[32] this examines the extent to which the 25 criteria (listed in Table 6.13) are contained within the principles. The criteria include a large number of procedural aspects, and Table 6.21 is helpful in highlighting criteria which should be used to evaluate any SEA. Where 'implied' is included this indicates that the principles themselves do not include this element individually but that it may be suggested in other principles or by accompanying material; this is indicated in the matrix where clear. Where 'no' is included this does not necessarily mean that the matter is unimportant, just that it is not specified.

It can be seen that all of the principles contain approximately half of the criteria, but that it is difficult to indicate general strengths or weaknesses. However criteria which may be regarded as essential to any procedure include numbers 7, 15, 19, 20, 22, and 24 (significance, alternatives, participation, documentation, review and monitoring - see also Chapter 2, section 2.1d). Each of the principles is exclusively applicable to public proposals, and it will be interesting to see whether the PPPs of the corporate sector are subject to evaluation in the future.

The principles of Sadler and Verheem are listed before the others as they are the most recent and arguably the most important; indeed the greatest number of the criteria are contained within the principles developed by Sadler and Verheem and, additionally, Sippe. The duplication of most aspects of the EA procedural principles in these principles is illustrative of a tendency for EA and SEA principles to have much in common.[33] Given Sippe's comment regarding the need for selecting 'key principles of EIA' for SEA,[34] it therefore appears that these key principles have been successfully woven into these SEA criteria.

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32 Other methods of considering procedural effectiveness are however available; these include additional criteria in the SEA Report of the International Study, such as the 'Generic Framework of Good Practice SEA', and in the summary and findings section at the end, 'Key Issues of SEA Practice: Process and Procedure'. The first describes in a little more detail good practice procedure, and the second focuses on the role of various actors in the process, the relationship between SEA and EA, and the importance of SEA quality standards and review mechanisms; op cit n 22, pp 173 and 179. A 'Checklist of Effectiveness Review Criteria' has also been produced for SEA, which briefly summarises the key procedural aspects; op cit n 22, p 66.

33 Such as similar objectives, with an increasing emphasis of both on contributing towards sustainable development; by integrating environmental, social and economic aspects in assessment, and emphasising common concerns for cumulative impacts to be addressed.

34 Op cit n 26.

Table 6.21: A Comparison of SEA Principles Against EA Procedural Criteria

EA Criteria	SEA Principles					
	Sadler and Verheem (1996)	UK DoE (1991)	UNECE (1992)	Sippe (1994)	Elling (1997)	Tonk and Verheem (1998)
1.environmental policy context?	yes	yes, reference in guide to policy plans	no	yes	implied	implied
2. objectives clearly defined?	yes	yes	yes, in Task Force Report	yes	yes	yes
3. provisions in law or policy?	no	yes, policy in UK	yes, in Task Force Report	no	yes, policy in Denmark	yes, policy in Nether-lands
4. support and guidance?	no	yes, expert advice available	yes, govt./ expert/public	implied	implied	implied
5. self assessment?	yes	yes	implied	yes	implied	yes
6. environment considered during PPP formulation?	yes	yes	yes	yes	implied	implied, early info needs
7. assessment proportionate to significance?	yes	yes	implied	implied	yes	yes
8. terms of reference clear?	yes	no	no	scoping guidelines	all parties involved	yes
9. timetable outlined?	no	no	EA only to be 'timely'	yes	implied	importanc e clear
10. applies to socio-economic effects?	yes	yes	yes	yes	implied	yes
11. applies to cumulative/ indirect effects?	implied	yes	yes, in Task Force Report	yes	yes	implied
12. applies to PPPs?	yes, tiering required	yes, tiering required	yes	yes	yes, bills	yes, bills and other PPPs
13. applies to public/private proposals?	public	public	public	public	public	Public
14. need considered?	no, unless 'do nothing'	yes	yes, in the Task Force Report	no, unless 'do nothing'	yes	implied, not stated
15. alternatives considered?	yes	yes	yes	yes	yes	implied, not stated
16. consistent application?	implied	implied	implied	implied	implied	implied
17. flexible application?	implied	implied	yes	yes	yes	yes
18. participants responsibilities clear?	implied	for policy makers only	implied	implied	yes, imp of procedure	implied
19. public participation?	yes	no general requirement	yes	yes	yes	consultatio n only
20. EIS public?	yes	no	yes	yes	yes	yes
21. decision oriented?	yes	yes	yes	yes	yes	yes
22. external review?	yes	no	yes	yes	no	yes
23. mitigation?	no	no	no	no	no	no
24. monitoring?	yes	yes	yes	yes	no	yes
25. cost effective?	no	yes	no	yes	implied	implied

The majority of the SEA principles remain dominated by procedural aspects. The role of SEA in the decision-making process is an exception, underscored by an environmental policy framework with clearly defined objectives. Yet there is a need for objectives to be given greater prominence, and for actions to be specifically based on them prior to criteria design. While policy change is arguably the most important aspect of substantive effectiveness, criteria could therefore also have been included to ensure procedural change if found wanting. This links with context, as with the exception of the environmental policy framework, contextual elements are unfortunately also absent. Principles for monitoring for example do not address procedural change, and improvements in opportunities for participation could also have been included.

3. Suggested SEA procedural and contextual criteria

3.1 Procedural criteria

Table 6.22 below sets out the procedural criteria derived from each of the EA principles and criteria in section 1. In Table 6.21, these were used to compare the SEA principles that have developed to date. It is appropriate to retain each, because while certain of them are key to any system of EA or SEA,[35] they are the most comprehensive set available; as such, applying each of them to legislative EA in Canada and the Netherlands enables the most detailed information to be obtained for analysis.

There is no need to explain the importance of each of the criteria again, as this has been adequately dealt with earlier in the thesis. For example Chapter 2, section 2.1d contains a discussion of the main procedural stages; Chapter 6 sets out many of the EA and SEA principles, and this includes commentary upon the importance of each of the individual criteria.

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35 In particular provisions for significance, alternatives, documentation, participation, review and monitoring. See Tables 6.19 and 6.20 above, and note also the 'recognised stages of SEA systems' that have been employed recently to evaluate the proposed EU SEA Directive; see Von Seht, H, and Wood, C, 1998. 'The Proposed European Directive on Environmental Assessment: Evolution and Evaluation' 28/5 *Environmental Policy and Law*, p 243.

Table 6.22: Proposed SEA Procedural Criteria

1.	Is there an environmental policy context to guide the implementation of SEA?
2.	Are the objectives of the SEA clearly defined?
3.	Are provisions for SEA clearly set out in legal or policy requirements?
4.	Is adequate support and guidance provided for the participants?
5.	Is the proponent responsible for the conduct of the assessment?
6.	Must the environment be considered in the formulation of the PPP?
7.	Must the assessment be proportionate to the significance of the proposal?
8.	Are the terms of reference of the assessment clear?
9.	Has a timetable for the assessment been established?
10.	Does the assessment apply to socio-economic effects?
11.	Does the assessment apply to cumulative/indirect effects?
12.	Does the assessment apply to all PPPs?
13.	Does the assessment apply to public and private proposals?
14.	Must the need for the proposal be considered?
15.	Are all alternatives considered in the assessment process?
16.	Is the process applied consistently?
17.	Is the process applied flexibly?
18.	Are the responsibilities of each of the participants clearly set out?
19.	Are there provisions for the public to be involved at each stage of the process?
20.	Is the EIS publicly available?
21.	Does the assessment have an influence upon the decision-making process?
22.	Must the assessment be reviewed by a body external to the proponent and competent authority?
23.	Must all significant impacts of approved proposals be adequately mitigated?
24.	Is the approved proposal monitored after implementation to ensure outcomes are as predicted and any conditions imposed are complied with? Is the SEA system itself monitored for effectiveness?
25.	Is the process cost effective?

3.2 Contextual criteria

Based on the existing SEA criteria and the contexts previously discussed (in Chapter 5, section 2.2), it is possible to suggest a number of additional SEA criteria which relate to underlying contextual issues, and supplement the procedural criteria. For ease of consideration, these are also divided between social/political, environmental/economic, and legal/administrative contexts. In developing criteria, the relationship between each context and their objectives, principles and criteria needs to be emphasised. The three contextual frameworks are therefore linked with their objectives, principles and criteria in Table 6.23 below, and a description of each follows. Although the main elements are identified, the criteria are not suggested as definitive, and there may be any number of likely alternatives.

Table 6.23: Proposed Contextual Criteria for Legislative EA

Context	Social/ Political	⇒	Environmental/ Economic	⇒	Legal/ Administrative
Objective	Democratic Government	⇒	Sustainable Development	⇒	PPP Implementation
⇓	⇓		⇓		⇓
Principle	Accountability		Integration and Coordination		Use of appropriate legislation
⇓	⇓		⇓		⇓
Criteria	Is information freely available and are there opportunities for public participation?		Is guidance available at all levels and is the most appropriate policy tool used?		Are there opportunities to review and monitor legislative proposals?

The contexts are presented in such a way that they relate to one another. The social/political context with the objective of democratic government is presented first, as this is the most important of all. Without a democratic government there are no opportunities for the public to shape the passage of legislation, and the likelihood of the environment being considered alongside the economy in decision-making will be slim. From the objective of democratic government comes the need for sustainable development to guide all policy-making, the objective of the environmental/economic context. Finally, PPPs are implemented most commonly by legislative proposals, and the legal/administrative context is therefore presented last. The principles of each of the contexts are included beneath the objectives, with the criteria below these in turn.

a. Social/political

The development of social/political criteria is indicative of the strong link between the social and political contexts. The objective of democratic government is suggested as the ideal context within which SEA and legislative EA can operate. If information is freely available, values and interests may be represented through participation, and this is the best way of ensuring the government is accountable to those it serves. With reference to EA, it has been suggested that the development of 'environmental acceptability criteria' in Western Australia should take into

account aspects such as 'fairness, integrity, community values, fear of risk or uncertainty of change and practical participatory democracy':[36]

> This is because EIA is not science, it is about value-driven judgements leading to political decision making. As such, while science can provide a basis, common sense and community opinion can be just as influential in the outcome. The value of EIA is not diminished by this: if anything it is enhanced for in many jurisdictions it offers one of the few systematic, consistent and encouraged opportunities for public involvement in government decision making before decisions are taken (ie able to influence the input to the decision rather than object to it afterwards.)[37]

The social/political criteria are therefore designed to illustrate that only those systems based upon participatory or representative democracy are likely to attain SEA effectiveness because checks and balances ensure accountability.[38] Criteria for involvement of the public and the availability of information are ways to ensure this,[39] and although issues of confidentiality have been one of the greatest challenges of SEA to date,[40] there is an ongoing need to clarify those matters which raise legitimate concerns in order that they be minimised. It may also be appropriate to consider funding provision for public involvement, where it is clear that the policy process can only benefit from it, and issues of equity are raised.[41]

Lambrechts cites from Kramer, an acknowledged legal authority on environmental law in Europe. Kramer emphasises the need for environmental matters to be discussed in an open society governed by a democratic procedure. The most important conditions to be fulfilled are stated by Lambrechts to be 'access to environmental information', and 'the possibility of the public - the individual, as well as associations or groups - participating in environmental discussion'. He concludes:

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36 These criteria respond to judgements made on the limits of environmental change that are predicted to result from a proposal. 'Environmental acceptability' is the limit placed upon environmental change by the community. See Sippe, R, 1996. 'Improving the Effectiveness in EIA Through Quality Assurance and Environmental Acceptability Criteria', *paper presented to the Annual Conference of the International Association for Impact Assessment*, Estoril.

37 Ibid.

38 See Roberts, R, 1995. 'Public Involvement: From Consultation to Participation', in Vanclay, F, and Bronstein, D, (ed), *Environmental and Social Impact Assessment*, John Wiley and Sons, Chichester, p 223, where the distinction between the two models is discussed.

39 See Winter, G, 1996. 'Freedom of Environmental Information' in Winter, G, (ed) *European Environmental Law: A Comparative Perspective*, Dartmouth: Aldershot, pp 81-94.

40 See Chapter 3, section 4.4.

41 Funding provision for participation is also discussed by R Roberts; op cit n 38, p 237. Note that the *Canadian Environmental Assessment Act* includes provision for both this and freedom of environmental information with regard to projects.

> It is indeed essential, in this perspective, not only to give the public better legal tools but to develop environmental awareness and to persuade the public to use existing means and not to underestimate their capability to influence political decisions.[42]

b. Environmental/economic

With regard to the objective of sustainable development, there is a need for a national framework to guide particular policy instruments. Policies operating in isolation often conflict with one another, and this is likely to be a more significant problem where an overreaching framework is absent. The principle of integration and coordination is therefore cited, for where these are present, matters tend to be much simpler:

> Formulating public policy with due consideration for environmental factors, including views of the community, has major implications for the subsequent evaluation of individual development proposals. If the policy context already exists and is environmentally sound, it follows that environmental assessment of a related proposal will be more readily accomplished and with fewer surprises for all concerned.[43]

Criteria cited in Table 6.23 for environmental/economic contexts are therefore designed to ensure that guidance is available at all levels following the policy needs of the NSDS, and that the most appropriate policy tool is used. As implementation may not be carried out through legislation, it is important that all regulatory options are also coordinated. With reference to EA, a section in the Canadian RIAS provides for alternatives to regulations to be included. This acknowledges that policy instruments such as taxation or subsidy may be more useful in securing compliance with the desired outcome. How these instruments are formulated and implemented will however be very important, and it is therefore vital that options are considered as fully as possible, and in accord with its objectives.

It is particularly important to recognise that there is often a gap between the release of policy statements and effective policy implementation. This is because there may be a number of reasons for the release of policy statements, including political image building. A failure to implement policies may also be due to a number of reasons, including administrative incompetence. Above all, it is important to understand that there is a

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42 Lambrechts, C, 1996. 'Public Participation in Environmental Decisions' in Winter,G, (ed), *European Environmental Law: A Comparative Perspective*, Dartmouth: Aldershot, p 108.

43 Australian and New Zealand Environment and Conservation Council, 1991. *A National Approach to Environmental Impact Assessment in Australia*, p 1.

difference between procedurally having a policy and it being substantively effective. Evaluation of this is unfortunately beyond the scope of this thesis.

c. Legal/administrative

The objective of the legal/administrative context is policy implementation. To ensure a commitment of all of those involved in the regulatory process,[44] it is vital that certainty be maintained and that there is no overlap of regulatory action. Policy tools must therefore be coordinated once implementation by legislation is decided upon as:

> There can be no doubt that inconsistency between regulations and lack of co-ordination between responsible departments can prove a major obstacle to technical change. It is not uncommon for industry to be faced with contradictory requirements...[45]

The use of the most appropriate type of legislation is suggested as the principle for the legal/administrative context. In practice this means statutes rather than regulations for policy implementation, to avoid the potential for the latter to be misused as Henry VIII Clauses. However as principal legislation is usually developed in secret, it is important there there be opportunities for review. While this is the function of parliament, once a proposal has been formulated there may be less opportunities to consider matters such as whether alternatives are more appropriate. With regard to subordinate legislation, this is often reviewed by committees to ensure compliance with the principal act. If subordinate legislation is appropriately used, and committees are not dominated by the governing party, this is a useful role.

With regard to EA, although there are a number of internal mechanisms to ensure this,[46] and two reasons have been put forward to explain why a body external to government is needed:

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44 With regard to the public, see Ramamoorthy, S, and Baddaloo, E, 1991. *Evaluation of Environmental Data for Regulatory and Impact Assessment*, Elsevier: Amsterdam, pp 426-434. Note again the overlapping contexts here, this time with the social criteria.

45 The need for certainty and coordination of regulatory action was indicated by the OECD; see Organisation for Economic Cooperation and Development (OECD), 1985. *Environmental Policy and Technical Change*, OECD: Paris, pp 41-43.

46 Such as review by the lead or environmental agency, inter-agency review, public review by an independent panel, and review by a standing commission within the government; see Sadler, B, 1995. *Environmental Assessment: Toward Improved Effectiveness*, Interim Report and Discussion Paper, IAIA/CEAA, p 21. Note that EIS review by Congressional committees had been the original NEPA intent; see Anderson, F, 1973. NEPA in the Courts, John Hopkins University Press, p 127; O'Riordan

> The first is that internal mechanisms have inherent limitations. The reforms needed to integrate environmental factors in policy making will upset traditional bureaucratic relationships and will be resisted unless they are reinforced through other means. The second is that, until now, most of the pressure to place a greater weight on environmental matters on policy making has come from environmental groups and the public.[47]

The courts have traditionally been responsible for oversight of NEPA-type processes, but independent review bodies such as the Dutch EIA Commission have also been looked to as alternatives elsewhere. Each has had its critics. A common complaint for both is the length of time taken over deliberations, with the court system attracting additional criticism due to its divisive nature. Another alternative which has received a more positive response is the role of an environmental auditor or ombudsman. The New Zealand Parliamentary Commissioner for the Environment is an example,[48] as is the Canadian Commissioner for the Environment and Sustainable Development. The Canadian Commissioner (highlighted in Chapter 7), is well placed to ensure that the environmental 'implementation gap' is kept to a minimum.

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and Sewell have also recommended the use of the legislature in this way; O'Riordan, T, and Sewell, W, (ed) 1981, *Project Appraisal and Policy Review,* John Wiley and Sons, Chichester, p 26.

47 Bregha, F, (ed) 1990. *Report on the Workshop on Strengthening the EA of Policy*, CEARC, p 18. See also O'Riordan and Sewell, op cit n 46, p 4.

48 See Buhrs, T, 1996. 'Barking Up Which Trees? The Role of New Zealand's Environmental Watchdog' 48 (1) *Political Science*, pp 1-28.

Conclusions

A number of countries have been involved in developing principles and criteria for evaluating the effectiveness of EA. These include Australia and Canada, and many others that actively participated in the International Study into the Effectiveness of EA (section 1). Several of these principles and criteria have been adapted for SEA processes, by the UNECE and by a number of practitioners in Australia and Europe (section 2).

The primary conclusion of this Chapter is that criteria are a useful way of evaluating the effectiveness of SEA. Each criterion is significantly derived from the EA criteria, and each is dominated by procedural matters. If the substantive dimension of effectiveness is to be adequately addressed however, these criteria need to be more closely related with objectives, and they must include provisions for evaluating the influence of SEA on decision-making and environmental outcomes (section 2.4). Each of these matters were examined in Chapter 5, section 3.

The secondary conclusion is that the effectiveness of legislative EA is dependant upon the presence of a number of features which should exist in the social/political, environmental/economic and legal/administrative contexts that underlie any SEA system. Having a thorough understanding of the different contexts within which procedures operate is therefore an important part of improving effectiveness. It is possible for these features to be included within contextual criteria (section 3.2).

Chapter 7 considers the application of the procedural and substantive criteria in Canada, and Chapter 8 in the Netherlands. Each of the proposed 25 procedural criteria and the 6 contextual criteria are used to evaluate the systems of legislative EA in each country. While each of the 25 procedural criteria are applied, it is accepted that some of these will be of greater importance than others. These are the provisions for significance, alternatives, documentation, participation, review and monitoring which have been highlighted in section 3.1 above.

PART 3:

APPLYING CRITERIA TO LEGISLATIVE EA IN CANADA AND THE NETHERLANDS

Chapter 7 - Legislative EA in Canada

Introduction

The purpose of this chapter is to evaluate the effectiveness of Canada's provision for SEA as applied specifically to proposed legislation. The federal *Cabinet Directive on the Environmental Assessment of Policy and Program Proposals* 1990 is one of the oldest and more well established of the SEA provisions, and it is of interest to many people within and outside Canada. Four proposals are evaluated for compliance with the provisions of the Directive and the criteria developed in Chapter 6; this includes an analysis of the influence of contextual factors.

The context of legislative EA is considered first, to illustrate the importance of the framework in which SEA has been introduced. The social/political context examines: federalism and the Westminster system, political parties and the electoral system, constitutional change and civil liberties, accountability of government, and freedom of information. The environmental/economic context examines: environmental accountability, coordination of environmental policy, and integration of environment and economy. The legal/administrative context examines: the Memoranda to Cabinet and Regulatory Impact Analysis processes.

The Cabinet Directive procedures are considered next, and follow on from the background to SEA in Canada set out in section 2 of Chapter 4. The Directive is introduced with reference to its application, objectives and administration; procedural guidance set out in the Sourcebook and Bluebook is examined; and the evaluations of the Directive carried out by the Canadian Environmental Assessment Agency and Commissioner for the Environment and Sustainable Development, are analysed.

The final section evaluates experience with the Directive to date. The four legislative proposals chosen are described, and compliance with the provisions of the Directive are analysed. Finally, compliance with the procedural and contextual criteria developed in Chapter 6 is evaluated, in the light of the influence of the Memoranda to Cabinet and Regulatory Impact Analysis processes. The evaluation is presented in tabular form, before conclusions are drawn.

1. Context of legislative EA

Legislative EA in Canada is carried out under the provisions of the *Cabinet Directive on the Environmental Assessment of Policy and Program Proposals* 1990.[1] The background to the introduction of the Directive was set out in Chapter 4, section 2. The purpose of this section is to distinguish the contexts for assessment which influence the effectiveness of legislative EA in Canada. These are: the social/political context of democratic government, the environmental/economic context of sustainable development, and the legal/administrative context of PPP implementation. Particular aspects which may either help or hinder the process of legislative EA are highlighted (see Chapter 6, section 2).

1.1 Social/political

The Canadian state was deliberately patterned on the structures of the British parliamentary system, and the Canadian *Constitution Act* 1867 introduced the Westminster system of parliamentary government.[2] This was supplemented by federalism, and, more recently, the *Charter of Rights and Freedoms* 1982. Together with the party and electoral system, *Auditor General Act* and *Access to Information Act*, each contribute to the accountability of the Canadian government and are considered below.

a. Federalism and the Westminster system

The Westminster system emphasises the importance of the separation of powers between the executive, legislature and judiciary. This is necessary to ensure that the executive is accountable to the legislature, and that the courts and other independent officers of government are able to review and monitor breaches, (and potential breaches), of the exercise of public power. The executive branch is embodied in Cabinet government, headed by the Prime Minister. The legislature consists of a House of Commons and a Senate,[3] and the judiciary is headed by the Supreme Court.

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1 See Marsden; S, 1998. 'Why is Legislative EA in Canada Ineffective and How Can it be Enhanced?', 18/3, *Environmental Impact Assessment Review*, pp 241-265.

2 For a helpful overview of Canadian federal policy making and each of the actors involved, see Scott, S, 1992. *Environmental Considerations in Decision Making: A Role for EIA at the Policy Level?*, MES thesis, Dalhousie University: Halifax, pp 22-26.

3 For a brief discussion of proposed reforms to the Senate and House, see Krause and Wagenberg, 1991. *Introductory Readings in Canadian Government and Politics*, Copp Clark Pitman: Toronto, p 131. Note that there have been many calls for reform of the Senate, and the Australian experience has often

Much of the procedure of Canadian government derives from convention - the formalisation of originally informal rules that have developed from political practice.[4] As there is no reference to the Cabinet in the Canadian Constitution,[5] the role of convention is particularly important with regard to how the Cabinet examines legislative proposals. The appropriateness of the Westminster system has been questioned on many occasions. Although the model is designed to concentrate decision-making in the hands of a popularly elected executive, this does not often happen. Reliance is often placed on non-departmental bodies, which has resulted in fragmented policy-making. A true separation of powers is therefore lacking, and this has negative implications for accountability.

Federalism is an ever present and dominant influence, and may be defined as a sovereign state with central and regional governments that have exclusive control over particular areas of activity. In Canada, the federal and provincial governments also have overlapping powers, especially concerning environmental issues. As this has often meant that national initiatives are constrained by the necessity of ensuring support from the provinces, the collective future of the nation is often undermined by strong electoral and party pressures, which divert resources to particular regions and projects.[6]

Other major federalist constraints on Cabinet government include: the presence of parliamentary caucuses with a regional basis, which may bring pressure to bear on individual ministers or the Cabinet as a whole; a competitive electoral system which often changes the composition of government; a well-developed system of government departments and Cabinet agencies which lack coordination; and vociferous public opinion which has been critical of Cabinet government.[7] Although in general Canada's system of government is accountable to those whom it represents, and this accountability is strengthened in the ways outlined

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been looked to. See Cody, H, 1995. 'Lessons from Australia in Canadian Senate Reform', 18(2) *Canadian Parliamentary Review*, pp 19-25.

4 Heard, A, 1991. *Canadian Constitutional Conventions: The Marriage of Law and Politics*, OUP: Toronto.

5 Reesor, B, 1992. *The Canadian Constitution in Historical Perspective*, Prentice-Hall: Scarborough.

6 Atkinson, M, 1993. *Governing Canada: Institutions and Public Policy*, Harcourt Brace Jovanovich: Toronto, p 11.

7 Bakvis, H, and MacDonald, D, 'The Canadian Cabinet: Organization, Decision-Rules, and Policy Impact' in Atkinson, ibid, p 49.

below, there have been criticisms made of a number of these which are indicated.

b. Political parties and the electoral system

Canadian political parties have been criticised for a failure to adequately represent the interests of their members, and some have argued that their influence is declining as a result.[8] Although the dominance of certain parties may have changed, this is not to say that parties generally are in decline. This is illustrated by the influence of the Reform Party at the 1997 Federal election, and the New Democratic Party and Bloc Quebecois in earlier elections. Each has had a significant role to play in changing the balance of power relative to the traditional Liberal and Progressive Conservative parties, especially during the 1988 election.[9]

A key feature of party success is that Canada is dominated by the Westminster derived 'first-past-the-post' or 'single member plurality' electoral system. In contrast to many party systems in Europe including the Netherlands, (see Chapter 8); this ensures that while it is possible for new parties such as Reform to gain a foothold, (and indeed go on to secure significant electoral success), this is no easy matter. Such success does not however signal the commencement of a broader, consensual electoral base, (which electoral systems based on proportional representation tend to encourage[10]).

This is evidenced by the fact that only the Liberal and the Progressive Conservative parties have had sufficient support to form a national government. Instead, due to the influence of federalism, the Canadian nation state appears to be weakening still further following earlier inroads made by the Bloc Quebecois; it is therefore perhaps not surprising that the party system has been termed 'nationally regionalized.'[11] However

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8 Note the discussion of this in Krause and Wagenberg, op cit n 3, pp 288-289.

9 The author is grateful to have had the opportunity to observe first hand the May 1997 election; thanks are due to Terrence Schmaltz, (TJ), formerly Senate Page and presently Senate Legislative Assistant for being kind enough to show me around the Senate and House on Election Day.

10 Consensualism is in large part due to the fact that many proportional representation electoral systems are multi-member, and therefore end the situation where each representative has his or her own area to represent, and accompanying interests to pursue. For recent commentaries on the Canadian electoral system and recommendations for improvement, see Commonwealth Parliamentary Association, 1997. 'Round Table on Proportionate Representation', 20(1) *Canadian Parliamentary Review,* pp 28-32; and Weaver, R, 1997. 'Improving Representation in the Canadian House of Commons', XXX:3 *Canadian Journal of Political Science,* pp 473-512.

11 Op cit n 3, p 292.

changes in Canada's party system demonstrate that interest in popular democracy is strong, and Canadians are not reluctant to voice their opposition to the Government.

c. Constitutional change and civil liberties

The *Canadian Bill of Rights* was enacted in 1960 by the federal Parliament. However it was not entrenched in the Constitution, it only applied to federal matters, and it was restricted by the narrow interpretations the courts had given to it.[12] In contrast, the *Charter of Rights and Freedoms* 1982 was introduced in the tradition of the *American Bill of Rights* and the *European Convention on Human Rights.*[13] It marked an end to the concept of parliamentary supremacy, and transferred to the courts powers to review and declare invalid federal and provincial legislation.[14] It was part of a number of changes to the Canadian Constitution, which included the end of the need to petition the British Parliament in Westminster for constitutional amendments.

Whether or not the Charter has changed Canadian society for the better is difficult to judge. However it has played an important part in fostering political activism in the Canadian population, with the environmental movement being a good example.[15] The Charter includes: political rights, such as the right to vote and the requirement for regular elections; human rights, such as freedom of speech, assembly, religion and equality before the law; and legal rights, including provisions to protect the individual during the criminal process. Since its introduction, there have been a number of significant judicial interpretations which have secured these further. The Charter is therefore a central consideration of any overview of Canadian democracy.

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12 The Charter is found within Part 1 of the *Constitution Act* 1982.

13 There are many texts available on the Charter; as an example see McDonald, D, 1982. *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources*, Carswell: Toronto.

14 Ziff, B, 1992. *Accidental, Incidental, Fundamental: The Impact of the Charter of Rights on Canada's Legal and Political Culture*, University of Tasmania Law School Occasional Paper 3: Hobart.

15 Boardman, R, (ed). 1992. *Canadian Environmental Policy: Ecosystems, Politics and Process*, OUP: Toronto. Note that the repression of student protests at the Asia Pacific Economic Cooperation Forum held in Vancouver in November 1997 (by the Royal Canadian Mounted Police at the request of the Indonesian delegation) is likely to result in litigation to ensure peaceful protest is not questioned in the future.

d. *Accountability of government*

The *Auditor General Act* 1976-1977 established the Office of the Auditor General of Canada and, through amendments made in 1995, the Commissioner of the Environment and Sustainable Development, (see section 1.2a). Although the Auditor General is appointed by the executive, he may only be removed by the Parliament, thereby ensuring independence. The principal role of the Auditor is the examination of the accounts of departments and agencies, and the report to the House of Commons thereon. The Auditor is entitled to free access to information required to fulfil these duties, including examination on oath where necessary. An additional three reports may also be made to the House in any one year, following notice being given to the Speaker regarding the subject matter. The review of the assessment of the *Pulp and Paper Regulations* (PPRs) is an example of such a report (see section 3.1c below).

The overriding purpose of the Auditor General is therefore to ensure the accountability of the Government to the Parliament. The report to Parliament contains not only statistical information, but also an independent evaluation of it. This is a crucial aspect of the auditing process, and is of paramount importance in any democracy. Without it, there would be little objective information available to help Parliament examine the Government's activities and hold it to account.[16]

e. *Freedom of information*

The *Access to Information Act* 1983 permits Canadians to view all government held information subject to specific and limited exemptions.[17] Following the introduction of the first freedom of information (FOI) bill in 1965, nine years later the Standing Joint Committee on Regulations became the central forum for debate on Canadian FOI legislation. Although public hearings endorsed legislation in principle, it was not until 1979 that political will was present for legislation to become a campaign promise. Following electoral success, legislation was introduced by the

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16 For general information, see Office of Auditor General, 1998. *Auditing for Parliament*, booklet available on website - http://www.oag-bvg.gc.ca Note that the main criticism of the Commissioner's role is that his recommendations are not binding. He is therefore relient upon publicity to a large degree to ensure his recommendations are acted upon.

17 Information Commissioner of Canada, 1994. *The Access to Information Act: 10 Years On*, Minister of Public Works and Government Services Canada.

Trudeau government, although it significantly excluded Cabinet documents from the application of the Act.

The Government retained absolute privilege over Cabinet confidences, which has meant that the public release of the Memoranda to Cabinet, (MC - the document that accompanies the submission of proposals to the Cabinet), continues to be prohibited to this day. Disclosure of MC does not therefore occur, and the ability of the public to influence the preparation of legislative proposals is limited to influencing the parliamentary process. The clear disadvantage of this is that at this time the ability to affect the selection of alternatives is limited; unless the government opens the process by releasing consultation documents, there is no way of providing input at this important time. As a result, alternatives may be foreclosed, and proposals inadequately considered (see Chapter 3, section 1.2b).

1.2 Environmental/economic

In 1990 the *Green Plan* was announced as the principal instrument for furthering sustainable development in Canada. It has been criticised for three main reasons: its emphasis upon research and public education at the expense of concrete programs for protecting the environment; its inadequate public consultation; and its failure to integrate with socio-economic policies.[18] In the face of such opposition, the Government brought it to an end and concentrated on other initiatives. Despite the failings of Green Plan there have been a number of other developments which have emphasised: environmental accountability, coordinating environmental policy, and integrating environmental protection and economic efficiency.

A number of environmental accountability initiatives may be identified. These include the role of: sustainable development strategies (SDSs), the Commissioner of the Environment and Sustainable Development, the

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18 Hoberg, G, and Harrison, K, 1994. 'It's Not Easy Being Green: The Politics of Canada's Green Plan, XX:2 *Canadian Public Policy*, pp 119-137; Johnson, H, 1995, 'Canada's Green Plan: Making a Virtue of Necessity', in Johnson, H (ed) *Green Plans: Greenprint for Sustainability*, University of Nebraska: Lincoln, pp 88-102; Dale, A, and Robinson, J, (ed) 1996. *Achieving Sustainable Development*, University of British Columbia Press: Vancouver; and Howlett, M, 1997. 'Sustainable Development: Environmental Policy', in Johnson, A, and Stritch, A, (ed), *Canadian Public Policy: Globalisation and Political Parties*, Copp Clark: Toronto. Note that the Green Plans demise has been criticised by the Standing Committee on Environment and Sustainable Development recently with regard to resourcing difficulties; see Standing Committee on Environment and Sustainable Development, 1998. *Enforcing Canada's Pollution Laws: The Public Interest Must Come First!* Paragraphs 31-32. Note also the ending of the Projet de Societe, (a related development), following a change of membership on the National Round Table on Environment and Economy.

Standing Joint Committee on Environment and Sustainable Development, the Environmental Accountability Partnership (EAP) and Improved Reporting Initiative. Coordination of environmental policy has been helped by the Canadian Council of Ministers of the Environment (CCME), Environment Canada, and the Federal Environmental Stewardship initiative. Finally, the National Task Force on Environment and Economy and National Round Table on Environment and Economy (NRTEE) have made considerable progress with regard to integration.

a. Environmental accountability

The 1995 amendments to the *Auditor General Act* required the production of SDSs by 'category I departments'[19] before the end of 1997, which are to be updated at least every 3 years. SDSs are now Canada's main provision for the advancement of sustainable development in the federal government and hold great promise for the future, albeit that significant matters such as comprehensive national guidance on their preparation remains to be promulgated. Aside from the SDSs and the *Guide to Green Government*, Canada therefore lacks national guidance.[20] The SDSs set the context within which policies and programs are to be assessed,[21] and SEA may serve as a tool to help implement the strategies.[22]

Sustainable development is defined in the amendments,[23] and a new office of the Commissioner of the Environment and Sustainable Development is established,[24] which is responsible for reporting to the House of Commons on the strategies.[25] The Commissioner is also given the power to make special reports (see section 1.2b),[26] receive and

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19 An Act to amend the *Auditor General Act*, 15 Dec 1995; these departments are those named in Schedule I of the *Financial Administration Act*

20 See Dale, A, and Robinson, J, (ed), 1996. *Achieving Sustainable Development*, UBC Press: Vancouver.

21 Arguably the strategies themselves should be also assessed under the Directive, given the reference on p 4 of the Blue Book to the Green Plan being assessed. The Blue Book contains the procedural guidance of the Directive. See Federal Environmental Assessment Review Office, 1993. *The Environmental Assessment Process for Policy and Program Proposals*, FEARO. It is termed the 'Blue Book' from the colour of its cover.

22 Interdepartmental Committee on Policy and Program EA, 1996. *Strategic Environmental Assessment: Recommendations for Strengthening the Process*, Interdepartmental Committee on Policy and Program EA, p 4.

23 S 5, inserts S 21.1.

24 S 5, inserting a new subsection 15.1(1).

25 S 3(1), inserting a new S 7(1).

26 SS 8(1) and 19(2).

ensure response to environmental petitions,[27] and report on anything considered to be of relevance to the environment and sustainable development.[28] This last power is extensive, and in the long term the Commissioner may consider the implementation gap surrounding many of the federal Government's environmental initiatives, including the 1990 Directive.[29]

The main procedural guidance available to assist departments in the preparation of their strategies, (and the Commissioner in the task of assessment), is contained within the 'Guide to Green Government'.[30] Constituting just 4 pages, it is perhaps not surprising that the strategies produced to date vary widely in form and content, and that the Commissioner has a major task in reporting to Parliament.[31] In May 1998 the Commissioner released his second Report, which drew attention to a number of areas where SDSs could be improved. If SDSs are to be used as the main mechanism to advance sustainable development in Canada, of most importance is the release of further guidance on the form and content of the strategies.[32]

The House Standing Joint Committee on the Environment and Sustainable Development also has an important role to play with regard to accountability. All bills falling within its jurisdiction are referred to it for consideration. These include the proposed *Canadian Endangered Species Protection Act* (CESPA, see section 3.1b). This died on the order paper on the calling of the 1997 federal election; a new bill is likely to be reintroduced before the northern spring of 1999, following agreement of Canada's environment ministers in Victoria, British Columbia in late

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27 S 5, inserting a new S 22.

28 S 5, inserting a new S 23(2).

29 Commissioner of the Environment and Sustainable Development, 1997. *Report to the House of Commons*, Minister of Public Works and Government Services Canada. The Commissioner Brian Emmett made the point in an interview that he felt the momentum of the Directive had been overtaken by the strategies. Although he is cited on the last page of the Blue Book as available for information on environmental matters regarding the Directive, he stressed that he had no plans in his capacity as Commissioner to consider its implementation; see Emmett, B, *Personal Communication*, Ottawa, June 1997.

30 Government of Canada, 1995. *A Guide to Green Government*, Minister of Supply and Services Canada. Other guidance is scattered elsewhere; see Environment Canada, 1995. *Directions on Greening Government Operations*, Minister of Public Works and Government Services Canada; and Environment Canada, 1997. *Reference Book on Sustainable Development*, unpublished.

31 S 24(5) of the principal Act permits this.

32 Commissioner of the Environment and Sustainable Development, 1998. *Report to the House of Commons*, Minister of Public Works and Government Services Canada.

September 1998. The Committee is also able to call any minister to account for the environmental implications of new policies or programs. This is an important power which has been used with good effect (see footnote 35).

Supplementing this further are the EAP and Improved Reporting Initiative. The first was developed in 1992 between Environment Canada and the Treasury Board Secretariat (TBS), to assist departments and agencies to discharge their environmental obligations.[33] Through a Steering Committee, the agreement provides a means of consensus building on environmental accountability in government operations.[34] The Improved Reporting Initiative is a related development, and is designed to ensure that parliamentarians better understand the work of the departments.[35] Begun as a pilot development by the House Committee on Procedure and the TBS, the initiative involves sixteen departments and is intended to ensure clearer reporting and accountability.

Each of the above developments is an important contribution to the objective of sustainable development, and each is designed to ensure not only that the environment is an important component of policy- and decision-making, but that there are opportunities for this to be demonstrated. While accountability is the most important principle of democratic government, it is also a necessary component of the environmental/economic context of sustainable development (see Chapter 5, section 2).

b. Coordination of environmental policy

If environmental policies are not adequately coordinated then sustainable development is unlikely to be advanced (see Chapter 2, section 1.1b). The Canadian Council of Ministers of the Environment (CCME - formerly the Canadian Council of Resource and Environment Ministers) plays an

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33 Promoting Environmental Management Systems (EMS) implementation across the federal government is a key part of this, with the Federal Committee on Environmental Management Systems (FCEMS) reporting to the EAP Steering Committee.

34 The Auditor General's 1996 Report is supportive of the EAP, whose influence continues to grow. In 1996 eight departments and two agencies had actively joined the partnership, and in providing information and advice is set to continue its powerful coordinating and leadership role.

35 For an illustration of the importance of the Initiative to Parliament, see Standing Committee on Environment and Sustainable Development, *Transcript of Meeting 18 March 1997*. A related development is the initiative for Government Performance Indicators. Designed to modernise accountability through improved reporting of departmental performance results, the TBS has established 4 sectoral working groups for: 'a sound and prosperous economy, a secure and confident society, a safe and healthy environment, (and) responsive and accountable government'.

important role in coordinating Canadian environmental policy development. It does this by providing a joint response to emerging issues, setting national environmental strategies, and developing long term plans. Meeting regularly, it comprises all of Canada's federal, provincial and territorial Environment Ministers, each being of equal status. In 1993 the CCME identified harmonisation of environmental management as a top priority, and the Canada-Wide Accord on Environmental Harmonization was developed; this was given approval in principle by the Environment Ministers in 1996. It provides a framework for achieving harmonisation, containing a vision statement and setting out objectives and principles.[36]

Together with the CCME, Federal Environmental Stewardship has been a key tool in coordinating environmental policy. Announced in the *Green Plan*, the Code of Environmental Stewardship was released in 1992. It outlined areas to be addressed by departments and agencies through actions plans, with an Office of Federal Environmental Stewardship (OFES) established within Environment Canada to ensure implementation. Although SDSs now replace the action plans previously prepared by departments under the Code, the majority of the agencies must still prepare the plans.[37]

The Auditor General has examined the implementation of the Code. One of the main findings was that Environment Canada in its coordinating role did not adequately advise other departments of the Code's requirements. Most of the information received led departments and agencies to believe that the Code was voluntary in nature only.[38] However departments and agencies are also allocated significant blame for failures in implementation, and hopefully the agencies complying with the Code will learn from this. It may well be that the Code has been useful for departments now preparing SDSs, as these can build on any action plans previously prepared.

The lack of auditing initiatives taken by departments and agencies is an illustration of how great the implementation gap has been. A specific

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36 These are to guide the development of ancillary Sub-agreements on specific areas of environmental management; to date these include Standards, Inspections, and EA.

37 As they are not listed in the schedule to the *Financial Administration Act.*

38 Report of the Auditor General of Canada to the House of Commons, 1996. *The Implementation of Federal Environmental Stewardship*, Minister of Public Works and Government Services Canada, p 9.

requirement under the Code, audits play a crucial role in measuring performance against goals and objectives. This aspect of the Code has largely been superseded by the requirement in the 'Guide to Green Government'[39] for departments to report to Parliament on their progress with SDSs in Part III of their 'Main Estimates'.[40]

Coordination of environmental initiatives remains a great concern, especially since there is no recommendation in the 1998 Commissioner's Report for the Government to release further guidance. However recent moves of Environment Canada to continue its OFES role in other areas may yield results.[41] It is, however, too early to make any firm judgements regarding these efforts, although it is to be hoped that if the relationship between them is strengthened (which surely it must), then consideration is also given to the environmental accountability measures described in section 1.2a above. These measures must also be coordinated if sustainable development is to be effectively implemented.

c. Integration of environment and economy

The National Task Force on Environment and Economy was formed in 1986 in response to the visit by the World Commission on Environment and Development to Canada. Even before the *Brundtland Report* was released, the Task Force initiated a national dialogue on the integration of environment and economy.[42] In the following year, it called for the establishment of a national framework to develop policies for sustainable development.[43] One of the policies advocated was the requirement that all Cabinet submissions include a section on environmental impacts, a second was that Canadian governments prepare SDSs, and a third that the Minister of the Environment be appointed to the Priorities and Planning

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39 Op cit n 30, p 17

40 These are a requirement for all federal departments and agencies; they enable the government to be accountable to Parliament through this rigorous reporting mechanism.

41 The Office ceased its functions on 31 March 1997; other areas include involving the Sustainable Development Coordinating Committee and the Interdepartmental Network on Sustainable Development Strategies in providing strategic policy direction to other departments.

42 Note the criticisms that have been levelled at the Task Force's definition of sustainable development; see Clark, B, 1989. 'The Relationship of Sustainable Development and Environmental Assessment, Planning and Management', in Jacobs, P, and Sadler, B, (ed), *Sustainable Development and Environmental Assessment: Perspectives on Planning for a Common Future*, CEARC, pp 128-129.

43 National Task Force on Environment and Economy, 1987. *Report*, Canadian Council of Resource and Environment Ministers: Ottawa.

Committee of Cabinet.[44] Although the first two were implemented by the 1990 Cabinet Directive and amendments to the *Auditor General Act* respectively, the third has not been taken up.[45] This is unfortunate, as it would have given the environment a heightened significance in Cabinet affairs.

A fourth recommendation was for the creation of national and provincial Round Tables on Environment and Economy, the intention being to focus national debate on the overlap between environmental and economic issues.[46] The National Round Table on Environment and Economy (NRTEE) was established as a Departmental Corporation in 1994, ensuring its independence from the federal government. Its members today represent a broad range of regions and sectors including business, labour, academia, environmental organisations and indigenous groups. It carries out its mandate by identifying key issues with both environmental and economic implications, fully exploring these implications, and suggesting action to balance economic prosperity with environmental preservation.[47]

The 'Guide to Green Government' sets out some examples of how a mix of policy tools may prove effective in integrating environment and economy. These include: voluntary approaches, information and awareness tools, economic instruments, direct government expenditure, and command and control measures. They are ordered in such a way as to demonstrate the range of flexibility available for producers and consumers, which range from the most flexible (voluntary) to the least flexible (command and control). The use of legal and administrative tools is most likely when there is a need for government to regulate, and may be seen in the latter half of the spectrum outlined.[48] These examples are

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44 This is the 'inner Cabinet', comprising the most powerful of the ministries and which has delegated decision-making authority for the Cabinet as a whole.

45 For discussion, see Bregha, F, Bendickson, J, Gamble, D, Shillington, T, and Weick, E, 1990. *The Integration of Environmental Considerations into Government Policy*, CEARC, p 38.

46 Gardner, A, 1994. 'Federal Intergovernmental Cooperation' 11 *Environmental and Planning Law Journal*, pp 104-136. Note that the participation by environmental organisations in the Round Table has caused problems because of differences in organisational structures, see Stefanick, L, 1998. 'Organisation, administration and the environment: will a facelift suffice, or does the patient need radical surgery', 41(1) *Canadian Public Administration*, pp 99-119.

47 National Round Table on Environment and Economy, 1997. *Annual Report 1996-1997*, Ottawa; on internet at http://www.nrtee-trnee.ca

48 Op cit n 30 ('Guide to Green Government'), pp 14-15. Note also the Task Force Report on the role of economic instruments in encouraging sound environmental practices; National Task Force on Environment and Economy, 1994. Economic Instruments and Disincentives to Sound Environmental Practices: *Final Report of the Task Force*, Government of Canada.

important, as they illustrate that there are a number of ways in which integration may be accomplished, tailored to the particular circumstances of the policy in question. However legislation is the most common implementation method, and is appropriately used in many cases.

1.3 Legal/administrative

An understanding of how legislative proposals are prepared is necessary to appreciate that two very different processes operate in Canada: for principal legislation (statutes), and subordinate legislation (regulations). Both are largely Government-led, with proposals formulated for statutes which, when passed, are usually implemented by regulations made thereunder. Each has its own process of evaluation, and the guidance on the Cabinet Directive, (the 'Blue Book', see section 2.2b), is to integrate with them. Principal legislation is subject to a process resulting in a Memoranda to Cabinet (MC), and subordinate legislation a process resulting in a Regulatory Impact Analysis Statement (RIAS). Each of these is outlined below, after the legal and administrative processes are described.

a. Memoranda to Cabinet (MC) process

The Canadian Constitution is silent on the processes of law-making. Although Parts III, IV, and VI deal with Executive Power, Legislative Power, and the Distribution of Legislative Powers, matters of legislative procedure are not included.[49] Convention points to the primacy of the executive in proposing legislation, and the means by which passage is secured. The procedural rules of the legislature are found in Standing Orders; these are drawn up by each legislative body and detail the way in which bills are introduced and dealt with.

The MC process is Government-led and requires that proposals submitted to Cabinet by departments and agencies must be prepared and presented in a particular way. Guidance is available from the Privy Council Office

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49 Section 9 for example states simply that 'The Executive Government and Authority of and over Canada is hereby declared to continue to be vested in the Queen'. The Cabinet is not mentioned, even though it constitutes the real executive authority. Similarly, Section 17 states that 'There shall be One Parliament for Canada, consisting of the Queen, the Upper House styled the Senate, and the House of Commons.' Although not stated, the passage of legislation requires the agreement of all three components, the Queen acting through the Governor General. Section 91 authorizes Parliament to legislate in matters not assigned to the provinces.

(PCO)[50] which describes the MC, when to prepare it, and its role in the Cabinet decision-making process. It advises that the release of a discussion paper sometimes forms part of the policy development process (see section 3.1b on the *Canadian Endangered Species Protection Act* - CESPA); however, once the policy proposal is finally developed, the Cabinet process is secret. There may be consultation with other departments and agencies, but once in Cabinet the only policy review that is undertaken is by Cabinet committees.

The MC takes a specific form, and consists of a Ministerial Recommendations section, and an analysis of the proposal. The Ministerial Recommendations section is a short advocacy document, where the issue and recommendations are put forward to Cabinet. Part of this is a Communications section, which sets out the impacts of the EA on the public and other relevant interests, and how the proposed action should be presented to ensure a positive reception. This requirement discourages submission of proposals that may be extremely unpopular with politically important interests. The analysis of the proposal sets out the factors considered in arriving at the options. Since the introduction of Canada's SEA procedures in 1990, MC have been required to consider the environment explicitly (see Chapter 4, section 2.2).

Once the Cabinet has approved the proposal, it is tabled in the legislature and given a bill number. When the bill has received its first reading, much of the work is performed in committees. The governing party has a majority on these committees and this is the case except when it has a minority in the legislature as a whole. The caucus of each party's representatives also plays an important informal role in the legislative process, as regular caucus meetings are used to discuss party policy, and committees are set up to refine policy following these. Some governing parties permit their caucus to scrutinise proposed bills prior to their introduction in the legislature. The government caucus is able in this way to insist on amendments to government policies, and possibly the withdrawal of the legislative proposal.

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50 Privy Council Office, undated. *Memoranda to Cabinet: A Drafters Guide*, Government of Canada. Note that alongside the Treasury Board Secretariat, Department of Finance, Prime Ministers Office and Federal-Provincial Relations Office, the PCO is a 'central agency' of government and plays an important role in looking after activities that cut across all of government. As such it has significant influence, and with regard to proposed legislation is responsible for advising departmental officials on MC and subsequent analysis of them.

b. *Regulatory Impact Analysis Statement (RIAS) process*

In Canada, much of the law is embodied in subordinate legislation with Parliament delegating authority to the Governor in Council (GC).[51] The result is often an absence of adequate legislative scrutiny, with regulations simply passed by a Special Committee of Council, comprising ten ministers of the federal Cabinet. An example of the extent of the use (or abuse) of this power, is that in 1991 the GC made 885 regulations and other pieces of subordinate legislation.[52]

The requirement for the Regulatory Impact Analysis Statement (RIAS) to accompany subordinate legislation has been one of the partial successes of the 1986 reforms of the Mulroney Government. Prepublication was a radical change when previously assessments were confidential Cabinet documents. However it is notable that while RIAS was originally to be applicable to both principal and subordinate legislation,[53] the process for each is today very different, with the MC process still shrouded in secrecy (see section 1.1e).

The RIAS process originated in 1986, when a report was presented to Parliament which led to Canada's regulatory system being overhauled.[54] The main finding was that Canada lacked a regulatory 'system', and options were therefore set out for a regulatory policy to guide action,[55] and for a general requirement for regulatory impact analysis.[56] Other options focused on improvements to the management and coordination of the process, and on strengthening the accountability of regulators to the

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51 Treasury Board Secretariat, 1992. *How Regulators Regulate: A Guide to Regulatory Processes in Canada*, Minister of Supply and Services Canada.

52 Stanbury, W, 1994. 'Holding the Government Accountable: Insights from Efforts to Reform the Federal Regulation-Making Process', in *Policy Making and Competitiveness: Proceedings of the Seminar on Policy Making and Competitiveness*, School of Policy Studies: Kingston.

53 Nielson Task Force, 1986. *Management of Government: Regulatory Programs - A Study Team Report to the Task Force on Program Review*, Minister of Supply and Services Canada, p 654; this was confirmed during discussions with one of the main authors, Eric Milligan, *Personal Communication*, Ottawa, May 1997.

54 Ibid.

55 Government of Canada, 1986. *Citizens Code of Regulatory Fairness*; Government of Canada, 1986. Guiding Principles of Federal Regulatory Policy.

56 Note that there had been a requirement for Socio-Economic Impact Analysis (SEIA) since 1978, which applied to all new regulations in the area of health, safety and fairness. However application was just to subordinate regulations and its use was mixed. Since 1996 there has been a requirement for a Business Impact Test (BIT), which considers impacts of regulations on the private sector; see Treasury Board Secretariat, 1996. *Managing Regulation in Canada*, Minister of Supply and Services Canada.

House. In 1986 changes were introduced, yet poor implementation resulted in the failure of some of the measures.[57]

In 1992 the Minister of Finance asked the Standing Committee on Finance to further review the federal regulatory process. A Sub-committee was delegated the task,[58] which had the opportunity to consider the effectiveness of the earlier reforms.[59] A supporting paper found that although accountability was superficially improved,[60] failures in implementation resulted from the underlying Westminster system of government. Given that most of the changes were in the form of discretionary administrative policies, these had failed to provide the means to hold the Cabinet accountable.[61]

Today the Regulatory Affairs Directorate of the Treasury Board Secretariat (TBS) is responsible for ensuring that departments and agencies follow the Government's regulatory policy, with the department or agency originating the regulations drafting them together with RIAS. RIAS explains the purpose of the proposed regulations, the alternatives considered and the likely effects; it summarises the results of consultation, explains the procedures and resources that will be used for compliance and enforcement, and gives details of a contact person for further information. Copies are sent to the Privy Council Office section of the Department of

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57 Auditor General of Canada, 1989. *Federal Regulatory Review Process: Report to the House of Commons*, Minister of Supply and Services.

58 Stanbury, W, 1992. 'Reforming the Federal Regulatory Process in Canada, 1971-1992', in *Minutes of Proceedings and Evidence of the Sub-Committee on Regulations and Competitiveness of the Standing Committee on Finance, Sub-committee on Regulations and Competitiveness, Third Session of the 34th Parliament, 1991-1992.*

59 The Government's response to the Sub-committee was published in Treasury Board Secretariat, 1993. *Responsive Regulation in Canada*, Minister of Supply and Services. One of the more notable recommendations is 5.3, that accountability be improved by permitting sub-committees of departments introducing regulations to review them.

60 Through the preparation of annual regulatory plans by departments and agencies, prepublication of subordinate legislation in the Canada Gazette Pt II, more frequent evaluation of existing regulatory programs (audit), and changes to the Standing Joint Committee on Regulations and Other Statutory Instruments. Note however that the preparation of plans is seldom enforced, the public rarely comment on prepublication, and evaluation of programs is of little use if the information is not acted upon. With regard to the latter, an interview with a Treasury Board Secretariat official made this apparent. See Brian Glabb, *Personal Communication*, Ottawa, May 1997. In addition, although the Standing Joint Committee for the Scrutiny of Regulations is able to rescind regulations under Standing Order 123 of 1986 (the disallowance power), this is seldom used. For the general mandate of the Committee, see Senate web site at: http://www.parl.gc.ca/english/senate/com-e/regs-e.htm

61 See Stanbury, op cit n 58, p 68. Note also Bill C-25, the *Regulations Bill*; although this died when the May 1997 federal election was called, future changes are likely to the regulatory system, however piecemeal.

Justice, to the TBS and to the PCO.[62] Since 1990, RIAS has also to include a discussion of environmental effects.

The Standing Joint Committee for the Scrutiny of Regulations has since 1972 been authorised to review and scrutinise statutory instruments.[63] Since 1980 it has also been authorised to study the means by which Parliament can better oversee and control the government regulatory process.[64] As a result, it has a broad jurisdiction to enquire into and report on most aspects of the federal regulatory process, with reference to a list of thirteen criteria. These include ensuring that the regulations: do not conflict with the enabling legislation, the *Charter of Rights and Freedoms*, or *Bill of Rights*; do not impose any charge or exclude court jurisdiction without express authority; and do not otherwise infringe the rule of law, trespass unduly on rights and liberties, or are contrary to the rules of natural justice.

One of the more important powers of the Standing Joint Committee is its disallowance power. Under Standing Order 123 of 1986, the Committee is empowered to make a report to the House recommending that a particular regulation be rescinded. The House must concur with this view however and the Committee is constrained by the nature of its composition. While it contains both a Government Chair and an Opposition Co-Chair, it is dominated by the party in Government. The Government Chair is able to shape the legislative process in the Government's favour, as it is able to ensure that there is always sufficient time to debate key proposals put forward by the Government .[65]

2. The Cabinet Directive procedures

This section examines: the introduction of the Cabinet Directive, the guidance that has been made available under its provisions, examples of

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62 Treasury Board Secretariat, 1996. *Federal Regulatory Process: Procedures for Submitting Regulations for Ministerial Approval*, (draft). Note that the TBS role is also to ensure that the operational plan of any proposal has received both policy and financial approval. Each is discussed in Krause and Wagenberg, op cit n 3, pp 166-167, and 168-170.

63 Under the *Statutory Instruments Act* 1972.

64 By an order of reference of both the House of Commons and the Senate.

65 Note the concerns of Glenn, that the role of legislative scrutiny committees can be undermined by ambiguity of parent legislation; see Glenn, J, 1995. *Holding Executives Accountable for Delegated Legislation: Selected Cases in Canadian Environmental Assessment Practice*, PhD thesis, Queen's University: Kingston.

practice, the 1996 CEAA compliance review, and the 1998 Commissioner of the Environment and Sustainable Development Report to the House of Commons. It provides a detailed overview of legislative EA in Canada to date, before the four legislative proposals are evaluated.

2.1 Introduction of the Cabinet Directive

a. Application and objectives

Procedural guidance was released under the Cabinet Directive in 1993, entitled the *Environmental Assessment Process for Policy and Program Proposals*. This is referred to as the 'Blue Book' for the colour of its cover. The Blue Book made it clear that the Directive is applicable to all federal policy and program initiatives submitted for Cabinet consideration, and that there are four types of policy and program decisions made by government which require assessment. Subparagraphs a and c deal with the application of the process to principal and subordinate legislation respectively,[66] both of which involve existing processes of assessment of proposed legislation. Each was developed over time to enable consideration to be given to legislative effects, primarily on the economy and society. The Directive both changes and strengthens these processes by ensuring that environmental effects do not go unnoticed.[67]

The desirability of assessing both environmental and non-environmental proposals is recognised in the Blue Book, as it enables departments and agencies with environmental mandates to set an example to others:

> Policy proposals which are developed specifically for the purpose of environmental protection or improvement, such as the Green Plan, may intuitively appear to not require an environmental assessment and public statement under this process. However, such undertaking can promote and set an example of the government following through on its commitment to assess the environmental effects of all policy and program proposals. Also, an explanation of the manner in which the proposal contributes to the achievement of environmental objectives would be appropriately addressed in this process.[68]

A number of exemptions are available from the requirements of the Directive. These include proposals in response to emergencies, where

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66 The application of subparagraph a to principal legislation was confirmed by Howell, J, at CEAA, *Personal Communication*, Hull, May 1997.

67 Op cit n 21, p 3.

68 Op cit n 21, p 2.

there is insufficient time to assess environmental consequences; cases of national security, which will always override other concerns; urgent cases where, for example, the economy of a particular sector is at stake and again response time is short; and TBS submissions, already assessed under previous Cabinet proposals, the *EARP Guidelines Order* or *Canadian Environmental Assessment Act.* It is recommended in these cases that assessments take place subsequently to learn lessons for the future.

The first page of the Blue Book states that the Directive is a non-legislated process which is designed to complement the EA process for projects under the Act. This is said to 'demonstrate Canada's commitment to sustainable development', with the objective to 'systematically integrate environmental considerations into the planning and decision-making process'. The information that comes from this is intended to 'support decision-making in the same way that other factors (economic, social, cultural) are now considered in evaluating proposals.'[69]

b. Administration

The Blue Book indicates that the Environment Minister is responsible for facilitating the process and advising other ministers on potential environmental effects before Cabinet decisions are taken. Although this is not to amount to a veto, the intention is to advise on appropriate courses of action which are consistent with environmental priorities. The Minister is supported by Environment Canada (EC) in this role, which is to help in establishing the environmental and sustainable development objectives and policies of the Government. Together with other departments, it now has in place its own SDS for this purpose; this indicates how objectives may be met and policies formulated.

The Canadian Environmental Assessment Agency (CEAA) is the successor to FEARO and is charged with the overall administration of both the Act and the Directive. CEAA is established by statute to operate at arms length from EC, although it is to support both EC and the Environment Minister.[70] It does this through maintaining an inventory of

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69 Op cit n 21.

70 Ss 61-74 of the *Canadian Environmental Assessment Act* 1995 contain the transitional provisions for the establishment of CEAA.

federal environmental reviews, providing procedural advice and system monitoring.

2.2 Procedural guidance[71]

Guidance under the Directive is extremely brief, and comprises the documentation known as the Sourcebook and the Blue Book. The former describes the rationale for SEA and contains suggestions as to methodological approaches to take; the latter sets out procedural requirements which are required to be followed.

a. The 'Sourcebook'

Following the report of Bregha et al in 1990, an Interdepartmental Working Group on Policy EA was established to develop SEA guidance,[72] and an informal handbook known as the 'Sourcebook' was subsequently produced.[73] It is applicable to SEA of both proposed and existing PPPs; although there is no formal requirement for the latter, it was part of the Government's commitment to the *Green Plan.*[74] It particularly recommends integrating environmental, economic and social factors in an assessment; defines many useful terms; and indicates the wide-range of federal areas with potential to impact upon the environment.

Each of the participants in the production of the Sourcebook cite flexibility as most important if SEA is to be successful, and after useful methodologies are outlined, agree on five main conclusions: that EA is a means to an end, not an end in itself; that there can be no single, standard method for SEA, nor universal criteria for judging significance; that SEA is the first but not the only (nor last) opportunity to anticipate and influence environmental impacts; that primary accountability for the assessment rests with the initiator, and that imperfection does not mean irrelevance.[75]

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71 Op cit n 21.

72 This is now the Interdepartmental Working Group on SEA.

73 Nicholson, J, 1992. *Environmental Assessment in Policy and Program Planning: A Sourcebook*, Federal Environmental Assessment Review Office.

74 Op cit n 73, p 9.

75 Op cit n 73, pp 31-32.

Further guidance on methodological approaches to take has subsequently been released from a number of specific departments,[76] and from CEAA, with the release of a Training Module and Guide.[77] These have all contributed significantly to an understanding of best practice approaches to SEA, with the most recent of the guides thoughtfully concluding:

> ...the challenge of strategic EA is not to find some complex methodology or model, but to *think in a new way* about the proposed policy or program. What kinds of activities may it trigger, and how will these interact with the bio-physical environment?[78]

b. The 'Blue Book'

The 'Blue Book'[79] contains the only procedural guidance on the application of SEA and legislative EA to federal Government PPPs in Canada. It sets out basic requirements for screening, report production, review, monitoring and consultation. The screening provisions are largely discretionary, and although application to certain types of policies is clearly indicated, it is incumbent upon the proposing department or agency to decide which proposals falling within paragraphs a-d on page 3 are likely to be 'environmentally relevant' (see Appendix 2).

There are no scoping provisions, and no opportunities for the public to be involved in scoping. It is simply suggested that where anticipated impacts are likely to be significant, then more detailed information should be provided. However it is left to the department to decide on the amount and type of information to be included. There is no explicit reference to whether information should be limited to environmental impacts, or also include socio-economic, and cumulative/indirect impacts. However as the Directive is stated to have the objective of demonstrating Canada's commitment to sustainable development, it would be surprising if reference to these were not expected.

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76 Such as Environment Canada, 1995. *EA of Policies and Programs for Cabinet Decision: A DOE Drafter's Guide*, EA Branch, National Programs Directorate, Environment Canada.

77 Interdepartmental Working Group on SEA/CEAA, 1997. *EA of Policies, Programs and Plans: A Training Module/A Guide for Policy and Program Officers*, CEAA.

78 Environment Canada, 1998. *The Strategic EA Course: Course Outline*, (draft). Many of these guides stress the importance of an 'environmental champion', an advocate who is able to put forward such issues and keep them on the agenda; see Rabe, B, 1997. 'The Politics of Sustainable Development: Impediments to Pollution Prevention and Policy Integration in Canada', 40(3) *Canadian Public Administration*, pp 415-435.

79 Op cit n 21.

Two forms of documentation are required for principal legislative proposals: the Statement on Environmental Implications is to be presented to Cabinet, and the Public Statement is to be released to the public. Both permit substantial flexibility. The Statement on Environmental Implications is a form of policy EIS and accompanies the MC. The detail contained within it is required to be proportionate to the significance of the effects, and if these are likely to be significant, a more detailed account of the EA should be included in supporting documentation.[80] The Public Statement announces the proposal. The Environment Minister is to determine the form and content of this, which is not required to detail the assessment. A draft of any Public Statement released should also be included in supporting documentation and attached to the Communications section of the Ministerial Recommendations.[81] However even where proposals will have significant effects, they are only required to be summarised.[82]

The process for subordinate legislation is affected in a different way by the Directive, and is carried out as part of the RIAS process. The environment must be considered in the 'Benefits and Costs' section of RIAS.[83] Apart from this, the Blue Book simply states on page 3 that 'the environmental analysis supporting the development of regulations will be enriched through the development of methods and through experience gained in other assessments at the policy level.' This is clearly inadequate, and does not go nearly far enough to achieve the certainty required by the Directive. Although the Blue Book also states that RIASs prior to 1990 considered environmental effects, analysis of statements produced in the years preceding the implementation of the Directive fails to substantiate this. Most statements concentrate upon the economic effect of regulations, with little if any mention of environmental impacts.[84]

Public consultation is stated to be an important part of both the MC and RIAS processes, and departments are encouraged to involve the public in

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80 Op cit n 21, p 6.

81 In a note released on October 25 1991 by the PCO to 'all Deputy Ministers in the Economic and Policy Sector', it was emphasized that a short section on 'Environmental Implications' had to be included in all cases in the MR; where no implications exist, this should be stated.

82 Bregha is especially critical of this; see Bregha, F, 1990. op cit n 45, pp 2-3.

83 Government of Canada, 1992. *RIAS Writers Guide*, Regulatory Affairs Series, No 1.

84 Discussions with Stanbury, W, indicate that consideration of the environment may have had more to do with the economic cost of regulations rather than the impact to the environment that may result; *Personal Communication*, Hull, May 1997.

whatever ways possible. However limitations are acknowledged given confidentiality concerns, and ministerial discretion guides the extent of public involvement. There would appear to be no encouragement given for a more active participatory role for the public in the process, and this is limited by the nature of Cabinet Government (see section 1.1a and e)

The House Standing Committee on the Environment is cited as an avenue for public scrutiny, and it can call any minister before it to explain the environmental implications of a new policy or program. It has used this power effectively recently as part of the EAP (see footnote 35). This does not amount to the exercise of a regular review function, although the role of the Parliament with regard to the passage of proposals is likely to be consistent with this (see Chapter 4, sections 1 and 4.1 regarding the US and Denmark). The Auditor General and Commissioner of the Environment and Sustainable Development have a significant potential role to play with regard to accountability, although whether either will utilise this on a regular basis is unlikely.[85]

2.3 Evaluation

a. CEAA Implementation Review, 1996

The CEAA Implementation Review of the 1990 Directive was based on information collected between 1993 and 1995. It consists of interviews with representatives of twenty departments and agencies, and the development of nine EA indicators to provide a basis upon which to evaluate progress. It is notable that in the two year period approximately twenty seven legislative or regulatory initiatives were assessed in eight departments or agencies.[86] Although these constitute the most frequently assessed type of proposal, most were assessments of subordinate legislation. This indicates that the advantage of RIAS is that it is a well established process with, among other things, existing opportunities for participation and consideration of alternatives. Linking legislative EA procedures with existing administrative procedures has therefore resulted

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85 These roles are considered in section 3.2b concerning contexts.

86 Details of which departments and agencies assessed proposed legislation is also available; see Canadian Environmental Assessment Agency, 1996. *Review of the Implementation of the EA Process for Policy and Program Proposals*, CEAA, pp 19-23.

in reasonable compliance with the Blue Book procedures, at least insofaras they overlap with each other.

Most of the indicators are based on procedural aspects of the Blue Book, but others set the context for its general application. Matters falling into the former category include: the approach to assessment, the role of expert advice and consultation, and the types of documentation used. Those falling into the latter category include: the accountability framework for application, the availability of an updated inventory of SEAs carried out, resourcing of the process, and the context of SDSs. The case study expands upon these areas, and applies additional criteria to particular legislative proposals.

The main findings of the review were that implementation to date had been mixed, with some departments making considerable progress while others had made little. Table 7.1 below summarises the main results, as compiled by CEAA. Most departments were found to have relied on ad hoc approaches,[87] and only a few had developed their own guidelines. Although the federal Government had improved the environmental context for its application, (with requirements for SDSs and useful further guidance),[88] had improved the accountability context (with new reporting requirements),[89] it still needed to reaffirm its commitment to the process, clarify its relationship with other environmental initiatives, and improve awareness and administrative support. There was also a clear need to tighten up and expand a number of aspects of Blue Book procedure including: provisions for screening, scoping, review and monitoring. As a part of this, alternatives, involvement of the public and cumulative and large scale effects needed greater attention.[90]

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87 Ibid, p 15.

88 Op cit n 30; see also the *Reference Book on Sustainable Development*, undated. Minister of Public Works and Government Services Canada.

89 There is a requirement to summarise the use of SEA in Pt III of the department's Main Estimates (an annual report to Parliament of departmental plans), and the Environmental Accountability Partnership between Environment Canada and the Treasury Board Secretariat has strengthened accountability to Parliament generally.

90 Op cit n 86, pp 43-46; these supplement earlier findings, see LeBlanc, P, and Fisher, K, 1994. 'Application of EA to Policies and Programs: The Federal Experience in Canada', *Paper for presentation at the Policy EA Workshop*, The Hague.

Table 7.1: Summary of Main Results by Indicator (CEAA, 1996)

INDICATOR	MAIN RESULTS
Policy and Program Proposals Assessed	Twelve of the 20 departments and agencies interviewed said that they had conducted one or more Policy EAs, including · legislative or regulatory initiatives · plans and programs · international and domestic agreements · research and development initiatives · broad policy reviews
Approaches to Conducting Policy EA	In most cases, it was unclear how Policy EAs were conducted. Where information was available, it indicated that three approaches are used: · integrating environmental considerations in policy formulation · assessing the environmental effects of proposals · reviewing the environmental effects of policies after decision-making but before implementation. Five departments or agencies have prepared guidance material on Policy EA.
Expert Advice and Consultation	Most rely on in-house expertise and there is little inter-departmental consultation. Since some departments and agencies have little or no staff with environmental expertise, environmental issues may not be adequately considered in policy and program development.
Accountability Framework for Policy EA	Four departments and agencies had accountability frameworks for Policy EA. All of them obtained advice and approval from organizational units dedicated to environmental management and planning.
Documentation of the Environmental Implications of Proposals	Nine departments and agencies said they had prepared documents on the environmental implications of proposals, but only five provided examples. The form of the documentation (eg reports, sections in MCs, written decision letters) depends on when and how environmental considerations are addressed in policy development and decision-making.
Public Statements and Communications	Few departments or agencies could provide any public statements or documents which described the environmental implications of proposals. Communications materials seldom address environmental aspects of proposals.

b. Commissioner's Report to Parliament, 1998

In late May 1998, the Commissioner of the Environment and Sustainable Development tabled his second Report to the House of Commons (see sections 1.1d and 1.2a).[91] Chapter 7 of the Report is an audit of the federal Government's implementation of the *Canadian Environmental Assessment Act* (the Act) and the *Cabinet Directive on the Environmental Assessment of Policy and Program Proposals.* Paragraphs 6.95-6.101 contain the Commissioners' comments regarding the Directive and CEAA's response.

Overall, the Report concludes that SEA is 'an essential tool for dealing with the broader environmental and sustainable development implications of programs and policies', and that without it 'federal departments and agencies may not be able to implement the government's sustainable development objectives' (paragraph 6.95). The contribution of SEA to sustainable development is therefore unquestionable in the

91 Op cit n 32.

Commissioner's view. The Report is significant because it serves to remind the House that SEA is an important requirement for federal departments and agencies, and must be taken very seriously indeed.

However the Report emphasises the conclusion of the CEAA Implementation Review that departments and agencies have been extremely slow to introduce SEA, despite the positive guidance that many of them have released (paragraph 6.97). The Commissioner's office carried out additional interviews as part of its audit, and these confirmed the findings of the Review. The lack of consultation with other departments and the failure of them to utilise their own EA experts is particularly striking, as without this the ability to coordinate and integrate the PPPs of each other is drastically reduced. In a few cases it was even found that senior management responsible for implementing the Directive were unaware of their obligations (paragraph 6.97).

In view of the inability of departmental guidance and training to improve implementation, and the unlikelihood of sustainable development strategies to contribute to this, the Commissioner recommends two things: 'additional pressure from parliamentarians, the public and the Commissioner for the Environment and Sustainable Development' (paragraph 6.100), and that CEAA 'should work with other federal departments and agencies to improve compliance' (paragraph 6.101). The most important of these is without doubt the first. While CEAA intends to follow up on its 1996 Review, its work to date has been limited by the priority that implementation of the Act has received, and inadequate political will.

It remains to be seen what parliamentarians and the public will do as a result of the Commissioner's findings. It is up to both to bring about change, as the Commissioner is limited by his legislative mandate. Certainly he can report further upon the Directive, and may make additional suggestions as to how implementation may be improved; but this is also the role of CEAA, and it is more appropriate that the Commissioner use the opportunity of reporting to Parliament annually on progress. In the longer term there may be some consideration given to introducing a legislative requirement for SEA, perhaps by amending the Act itself. However in the short term what is most immediately needed is the provision of clear guidance applicable to all those involved in the

process. The Blue Book does not provide this, and needs urgent revision.[92]

3. Experience to date: 1990-1998

The purpose of this section is to consider Canadian legislative EA experience with four proposals to date: two proposals for principal legislation (bills), which were documented under the MC process; and two proposals for subordinate legislation (draft regulations), which were documented under the RIAS process. Section 3.1 evaluates compliance with the provisions of the Cabinet Directive, and section 3.2 evaluates compliance with the procedural and contextual criteria developed in Chapter 6.

3.1 Compliance with the Cabinet Directive

For those outside Canada, the assessments carried out on the effect of heating oil regulations in Montreal,[93] the proposed changes to the *Immigration Act*,[94] and the *Western Grain Transportation Act* (WGTA),[95] are the best known, together with the more general SEA carried out on the North American Free Trade Agreement (NAFTA).[96] The WGTA

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92 The Interdepartmental Committee on Policy and Program EA considered revisions to the Directive and Blue Book in 1996, but no consensus was reached among those present. It is likely that one of the outcomes of the Commissioner's 1998 Report will be greater support for these necessary changes. See Interdepartmental Committee on Policy and Program EA, op cit n 22, p 13.

93 Roy, R, and Pellerin, J, 1982. 'On long-term air quality trends and intervention analysis', 16 *Atmos. Environment*, pp 161-69. This was neither an assessment under RIAS nor the Directive; rather it recognised that environmental impacts were likely from legislative proposals before the procedures were introduced.

94 Regier, H, and Bales, A, 1991. *Environmental Impacts of Immigration: A Preliminary Examination*, Employment and Immigration Canada: Ottawa; this considered the impacts the legislation would cause by migrants settling in particular urban centres like Toronto and Vancouver - essentially putting infrastructure under stress.

95 It is arguable that the assessment of the WGTA was not actually an SEA under the Directive, but was an SEA under the *Farm Income Protection Act;* see Hazell, S, and Benevides, H, 1998. 'Federal Strategic Environmental Assessment: Towards a Legal Framework', 17 *Journal of Environmental Law and Practice,* pp 349-377. This was certainly the case with the SEA of the Crop Insurance Program; see Campbell, I, 1996. 'SEA: A Case Study of Follow-Up to Canadian Crop Insurance', in Therivel, R, and Partidario, M, (ed) *The Practice of Strategic Environmental Assessment*, Earthscan: London, pp 169-178. However because this is uncertain, for the purpose of this thesis the WGTA is evaluated with regard to compliance with the Directive; see Agriculture Canada, 1992. *'Environmental Implications of Potential Changes to the Western Grain Transportation Act : Preliminary Technical Report'*, Agriculture Canada, unpublished: Ottawa, and Terrestrial and Aquatic Environmental Managers Ltd, 1992. *'An Environmental Assessment of Land Use Changes Due to Proposed Modifications of the Western Grain Transportation Act'*, prepared for Agriculture Canada, Policy Branch, Bureau for Environmental Sustainability, unpublished: Ottawa; the principal act is now repealed, the regulations never being implemented.

96 Government of Canada, 1992. *North American Free Trade Agreement - Canadian Environmental Review* Ottawa; here while the environmental impacts of NAFTA were extensively considered,

assessment is the most documented of these, and together with the proposed *Canadian Endangered Species Protection Act* (CESPA), *Pulp and Paper Regulations* (PPRs), and *Yukon Timber Regulations* (YTRs), is described below and analysed for compliance with the Cabinet Directive.

a. Western Grain Transportation Act (WGTA)

In 1989 Agriculture Canada identified environmental sustainability as a central theme in policy development; in 1990 it documented the issues to be addressed in the agricultural sector, and in 1992 proposed amendments to the WGTA as part of a legislative review. These were accepted by the government, and an assessment was undertaken. The purpose of the Act was to increase contributions from the federal Government and the grain shippers to provide the railways with adequate revenue for transporting grain. One of the environmental effects of the Act identified was that livestock, forage crops and crop rotation practices had been discouraged. The department was keen to mitigate these effects if at all possible.

The SEA carried out was beneficial in a number of ways: senior management were committed to the process, so its chances of success were increased; environmental considerations were integrated from the outset, which enabled a full range of options to be formulated; a multidisciplinary team was involved in the assessment, which ensured the availability of the widest possible expertise on all aspects; socio-economic effects were considered alongside environmental effects, which achieved integration; each of the assessment stages was peer reviewed, which enhanced the credibility of the process; the effects of each of the options was summarised, compared and evaluated in an executive summary prepared for the decision-makers, which was necessary to comply with existing practice; the assessments were publicly available as they were tabled in Parliament; and, finally, recommendations were made for environmental monitoring and data collection on farms as part of a follow-up program.[97]

The legislative EA carried out on the WGTA therefore complies with many of the procedural aspects which should feature in any SEA (see Chapter

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assessing these after the agreement was in force without considering procedural safeguards has brought criticism.

97 LeBlanc and Fisher, op cit n 90; and Hazell and Benevides, op cit n 95.

6, and Table 7.2 below). Although the amendments to the Act were never introduced, it is not surprising that it has so often featured in the literature. Of particular significance is the early assessment of the WGTA, which permitted all options to be fully explored. However while documentation was publicly available, it does not appear that it was easily accessible; few federal officials outside the department appeared to be aware of the release of the SEA.

b. Canadian Endangered Species Protection Act (CESPA)

The purpose of the proposed CESPA[98] was to prevent the extinction of any wild species. Based on a statement of principles, this would be achieved through the use of a list, to which an independent scientific body would make recommendations for inclusion. Constituted by federal, provincial and territorial members, once a species appeared on the list a response would be required through the development of recovery plans. CESPA is not in force; however the proposal was required to be assessed in accord with the Blue Book, and is a good example of a legislative proposal with great potential for impact. Indeed many believed that impacts would be greater with rather than without legislation, and as it died on the calling of the 1997 federal election an opportunity for a reconsideration became available.

In November 1994 a discussion paper was released by Environment Canada on a proposal for endangered species protection legislation and public comment was invited.[99] This was followed by the release of two further reports,[100] the establishment of consultation workshops, and the setting up of a Task Force, which subsequently released its own report.[101] Following the Bill's First Reading, it went to the House Committee on Environment and Sustainable Development which heard evidence from numerous individuals and groups.

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98 Reintroduced in the 2nd Session of the 35th Parliament as Bill C-65, 'An Act respecting the protection of wildlife species in Canada from extirpation or extinction.' It received its first reading on October 31, 1996, before it died on the calling of the May 1997 federal election; it is expected to be reintroduced in the northern spring of 1999.

99 Environment Canada, 1994. *Endangered Species Legislation in Canada: A Discussion Paper*, Environment Canada, Canadian Wildlife Service.

100 Government of Canada, 1995. *A National Approach to Endangered Species Legislation in Canada*, Government of Canada; Government of Canada, 1995. *The Canadian Endangered Species Protection Act: A Legislative Proposal*, Government of Canada.

101 Federal Task Force, 1996. *Task Force Report on Federal Endangered Species Legislation and Supporting Elements of a Federal Endangered Species Program*, Federal Task Force.

Although guided by a sustainable development framework, this did not appear to influence the proposal to any degree.[102] Consultation was fairly extensive and anticipatory, and involved stakeholders in the policy formulation process. However criticisms remained. The Bill was often compared with the US *Endangered Species Act* which has been in force since 1973. Unlike the Canadian provision, this protects all listed species, not only those on federal lands or under federal jurisdiction. Habitat of listed species under the US provision are protected automatically, whereas the Canadian provision requires assessment on a case-by-case basis. Although the US Act has been criticised for its application to private land, this has been vindicated by its high degree of success in protecting endangered species.

Criticisms of CESPA indicate that consultation was neither sufficiently participatory nor that alternatives were adequately considered. If this had been the case it would have been clear that the advantages of the proposal outweighed its disadvantages. Environmental advocates of a strong preservationist position were not the only critics. The federal cabinet was more deeply concerned about opposition from resource industries and provincial governments; the latter have constitutional jurisdiction over most provincial lands, and resent federal incursion into this.

Evaluating how other aspects of CESPA complied with the Directive is not an easy matter, as documentation forms part of the MC process which is not unfortunately released to the public (see section 1.3a). It is therefore necessary to rely on presumption in evaluating certain aspects of compliance. Whether the assessment presented to Cabinet was proportional to anticipated impacts is unlikely, given the content of the Bill eventually introduced, and it can only be assumed that the MC reflects a willingness to proceed in the face of opposition. No doubt the 'Environmental Considerations' section will state that the development of a legislative option will lead to an overall environmental benefit, but whether, (in the face of the criticisms briefly outlined), this will result in species and habitat protection is questionable.

Once a new bill is introduced in the northern spring of 1999, it is hoped that habitat protection will be a significant component. Clearly there is little

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102 See Environment Canada, 1997. *Sustainable Development Strategy*, Minister of Public Works and Government Services Canada.

point in legislation which protects species solely on federal lands only for that protection to be lost once the species moves to provincial lands. Aquatic species and migratory birds should also be included in the new proposal if it is to be fully comprehensive.

c. Pulp and Paper Regulations (PPRs)

The pulp and paper industry is a major contributor to the Canadian economy, the largest industrial user of water, and a major source of pollution. For these reasons it became a focus of government and environmental concern, which resulted in three different sets of PPRs.[103] The *Effluent Regulations* were intended to control conventional pollutants from mills in order to protect fish and their habitat; the *Mill Effluent Chlorinated Dioxins and Furans Regulations* were intended to control highly toxic compounds having immediate and long-term effects, both in general and on human health; and the *Mill Defoamer and Wood Chip Regulations* were intended to reduce possible precursors to toxic dioxin and furan, limiting their possible sources from defoamers and wood chips.

Guided by sustainable development, these regulations were among the earliest of the government measures produced under the Green Plan. They constituted what the government believed to be a sound regulatory program to control pollution by the industry. More recently Environment Canada has developed its SDS to maintain this policy context,[104] and in this respect the regulations satisfy the requirements of the Directive.

The regulations are of particular interest because they were the subject of a report by the Auditor General to the House of Commons in 1993, which looked closely at procedural effectiveness. While neither the Directive nor the Blue Book is specifically referred to in the Auditors' Report, the RIAS and the government's regulatory policy are. The RIAS was found not to be in accord with the policy, and the information provided to Parliament and public in the RIAS was considered inadequate. Consultation was also found to be inadequate, particularly during implementation of the regulations and with regard to environmentalist groups. As these are

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103 The *Pulp and Paper Effluent Regulations*, the *Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations*, and the *Pulp and Paper Mill Defoamer and Wood Chips Regulations*; see Canada Gazette, Pt II (Vol 126, No 11, 20/5/92). These are broadranging in scope, the first being passed under the *Fisheries Act* and the last two under the *Canadian Environmental Protection Act.*

104 Environment Canada, op cit n 102.

provided for by the Directive and Blue Book, the criticism also applies to the failure to implement these requirements.

Concerning environmental effects, the Report concluded that alternative and possibly more environmentally sensitive solutions could have been found; there was no regulation of dioxins and furans by their total toxicity, and the advantages and disadvantages of using site-specific pollution control standards, (based on the assimilative capacity of the watershed), were not discussed.[105] The first set of regulations was also considered by the Sub-Committee on Regulations and Competitiveness, which again looked at procedural effectiveness; it found that while the regulations only considered negative impacts on fish and fish habitat in line with the legislative scheme of the principal Act, the benefits to the environment in general or on human health in particular should arguably have also been assessed.[106] This is certainly true, as the Blue Book embraces a broad definition of the environment and the regulations should not have been bound in this way by the principal Act.

d. Yukon Timber Regulations (YTRs)

The YTRs are also in three sets, and govern the cutting and removal of timber on territorial lands administered by the federal Minister in the Yukon Territory. Commercial Timber Permits (CTPs) are required to cut wood, and in August 1995 higher stumpage fees and reforestation provisions were introduced through regulations in an effort to ensure that the Yukon forest was managed on a sustainable basis.[107] The benefits were to include an anticipated reduction in wasteful practices due to increased stumpage, and a replenishment of the stocked lands through reforestation. Further regulations in December 1995 introduced new eligibility criteria prior to operators receiving licences;[108] however following

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105 Auditor General of Canada, 1993. *Pulp and Paper Regulations: Report to the House of Commons*, Minister of Public Works and Government Services.

106 Stanbury, op cit n 58, appendix 'SREC-2', p 10. This also cites the failure of Parliament to debate the regulations; note however that the second set of regulations did discuss these benefits, on both users and non-users of watercourses.

107 *Yukon Timber Regulations*, amendment (under the *Territorial Lands Act/Financial Administration Act*) Canada Gazette Pt II (Vol 129, No 17, 23/8/95).

108 Canada Gazette Pt II (7/12/95).

a reduction in demand for timber, stumpage rates were reduced again, followed by a third set of regulations in December 1996.[109]

Sustainable development also framed the context of the YTRs. In 1990 the Yukon Territorial Government prepared the Yukon Conservation Strategy, committing it to the conservation and sustainable use of the forest resource in the development of policies, programs and legislation; a draft forest management plan was also prepared for the southeast Yukon. In 1992 the National Forest Strategy was released by the federal government, endorsing a commitment to maintain and enhance the long-term health of the forest ecosystem; in 1997 the Department of Indian Affairs and Northern Development (DIAND) prepared its own SDS.[110]

The August 1995 Regulations were preceded by the release of a discussion paper on policy changes to the timber industry in the Yukon.[111] The paper broadly satisfies the consultation requirements of RIAS and the Blue Book. It outlines some issues related to sustainable forestry: obtaining a fair return on stumpage, regenerating the resource through reforestation, and updating forest resource allocation. It accepts that managing the forest within the tolerance of the resource must guide action, which is in keeping with the need for a policy context to guide assessment. This is stated to be more important as environmental awareness increases, as 'forest practices and priorities within the Yukon must be tuned to meet today's challenges and tomorrow's concerns.'[112]

The consideration of alternatives and discussion of 'Benefits and Costs' are the most obvious illustration of the lack of procedural effectiveness. While the August 1995 regulations deal adequately with both, discussing the option of leaving stumpage fees intact and having no reforestation requirements, the December 1996 regulations are woefully inadequate in this case. The alternative of retaining the stumpage rates at the 1995 level is dismissed for its economic impact on the industry with no mention of the environmental impact of such a measure. Similarly in the 'Benefits and Costs' section, whilst the economic cost to the industry of a failure to

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109 Canada Gazette Pt II (Vol 130, No 26, 25/12/96).

110 Department of Indian Affairs and Northern Development, 1997. *Towards Sustainable Development: A Strategy for the Department of Indian Affairs and Northern Development.*

111 Department of Indian Affairs and Northern Development, 1995. *Policy Changes to Stumpage Pricing, Reforestation and Forest Tenure in the Yukon*, DIAND.

112 Op cit n 107, p 2376.

regulate is described, no environmental costs are cited. Admittedly the consultation section of RIAS does indicate that consultation had been with a broad range of stakeholders including environmental and indigenous groups. It also states that DIAND is taking steps to limit environmental impact as a result of the decision, however these steps were not specified.[113]

While a political decision was no doubt necessary as a result of the economic information contained within the RIAS, if this information was not balanced and was not complete, the basis of the decision is questionable. Failing to describe the environmental effects of increasing stumpage rates is neither in accord with the spirit nor the practice of the Blue Book, and suggests that environmental effects are described when there are benefits and where there are costs, they are simply ignored. This serves to illustrate how better procedures may facilitate better decisions, and thereby improve environmental protection. If environmental effects had been documented as they should have been, the decision-maker would have been in a better position to decide what action to take. Instead the information presented was one-sided; economic benefits were emphasised but environmental costs were ignored.[114]

3.2 Compliance with the procedural and contextual criteria

This section considers how the legislative EAs of the WGTA, CESPA, PPRs and YTRs comply with the SEA criteria developed in Chapter 6. In contrast with the provisions contained in the Directive (and RIAS), the criteria include many other matters which are necessary for procedural and contextual effectiveness.

a. Procedural criteria

The legislative EAs under the Directive comply superficially with fourteen of the twenty five criteria in Table 7.2 below. These are: provision of a policy context (1), clear definition of objectives (2), provision in law or policy (3), provision of support and guidance (4), self-assessment (5),

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113 Op cit n 107, p 3375.

114 DIAND has been considering a market-related variable stumpage system as a long-term solution in conjunction with a substantive review of the forest regulatory system. This was expected to be completed in 1998, and hopefully may introduce requirements to ensure that such omissions are not repeated.

consideration of the environment during PPP formulation (6), clear terms of reference (8), timetabled outlined (9), application to socio-economic effects (10), application to a range of PPPs (12), participants responsibilities clear (18), mitigation (23), monitoring (24), and cost effectiveness (25).

The most notable exclusions include: the failure of most of the assessments to be proportionate to their significance (7); the absence of the MC requirement to consider need (14); the failure of CESPA to consider alternatives (15); the limited opportunities for public participation (19), the failure to release a full EIS to the public (20); and opportunities for review (22). In Chapter 6, the importance of the six key principles of significance, alternatives, participation, documentation, review and monitoring were highlighted, (see section 2.4); the absence of all except one of these, (monitoring), is of particular concern.

The failure to document cumulative/indirect effects (11) is also unsatisfactory, given the potential for these to exceed the sum of individual impacts and be especially difficult to perceive. It is also not possible to determine whether any of the assessments influenced the decision on whether and how to proceed with the proposals (21); the approval of the bills and regulations was decided in secret.

While need and alternatives must be considered as part of RIAS, whether environmental alternatives are always considered is questionable in the light of the evaluation of the legislative EAs carried out on the PPRs and the YTRs. Under the MC process there is also a requirement for all options to be considered in the analysis section. However again the inadequate attention given to the drafting of an endangered species provision along the lines of the US Act implies that environmental alternatives are not always presented. There should be an explicit requirement for these to form part of both the RIAS and MC processes, and this should be stated unambiguously in the Blue Book.

The ministerial discretion that guides the extent of public involvement and the release of information to the public is also of great concern. A failure to involve the public adequately was rightly criticised by the Auditor General in his report on the PPRs, and while consultation with the public during the drafting of the YTRs and CESPA was broad-ranging, it is notable that this was limited to predetermined issues. The public must be involved in early

scoping of issues, and involvement must continue throughout with the full release of relevant information.

The main difficulty comes from the conflict between Cabinet responsibility and the desire of those affected to be involved in the policy and decision-making process. The release of documentation to the Parliament in the WGTA SEA illustrates that assessment of the legislative proposal after the decision had been taken meant that confidentiality concerns were no longer an issue. Where decisions have not been taken and it is still a matter for Cabinet, discretion should be exercised, with appropriate balancing of issues rather than simply preventing the release of all information.

With regard to monitoring, the requirements for environmental monitoring and data collection under the WGTA, the three year monitoring mechanism under CESPA, an Environmental Effects Monitoring program under the PPRs, and for regular inspections of work carried out under the YTRs are useful. These are however required by legal/administrative practice in order to ensure that implemented legislative proposals continue to comply with their original purpose.

Compliance (and non-compliance) with many of the criteria is ultimately dependent upon whether they form part of existing practice under the MC and RIAS processes, and Table 7.3 below should be cross referenced. This sets out how the contexts considered in Chapter 6 influence procedural compliance, by indicating how existing legal/administrative practice complies with additional criteria. These include the opportunities for independent evaluation that are afforded by the Office of the Auditor General.

Table 7.2: Application of Proposed Procedural Criteria in Canada

Criteria	Compliance and Comment	
	Directive / MC: WGTA and CESPA	Directive / RIAS: PPRs and YTRs
1. Environmental policy context?	WGTA – Yes, environmental sustainability, Agriculture Canada CESPA - Yes, EC's SDS	PPRs - Yes, EC's SDS YTRs - Yes, DIAND's SDS
2. Objectives clearly defined?	Both - Yes, integration of environment into planning and decision-making	Both - Yes
3. Provisions in law or policy?	Both - Yes, policy by Cabinet Directive although WGTA may have been assessed under Farm Income Protection Act	Both – Yes, policy with environmental enrichment of RIAS process
4. Support & guidance?	Both - Yes, by CEAA, EC and Interdepartmental Committee	Both – Yes, by EC and DIAND the proponents
5. Self-assessment?	WGTA – Yes, Agriculture Canada CESPA – Yes, EC	PPRs - Yes, EC YTRs - Yes, DIAND
6. Environment considered during PPP formulation?	Both - Yes, at early stage of development	Both - Yes
7. Assessment equal to significance?	WGTA – Yes, thorough assessment CESPA - No, discussion of alternatives needed	PPRs - No, see comments of Auditor General YTRs - No, impact on environment not mentioned
8. Terms of reference clear?	Both - Yes	Both - Yes
9. Timetable outlined?	Both – Yes, subject to legal process	Both – Yes, subject to administrative process
10. Applies to socio-economic effects?	WGTA - Yes CESPA - Yes, but concerns about protection of species on private land	PPRs - Yes, economic effects of equal importance YTRs - Yes, employment concerns expressed
11. Applies to cumulative / indirect effects?	Both - Not discussed	Both - Not discussed
12. Applies to PPPs?	Both - Yes	Both - Yes
13. Applies to public & private proposals?	Both – Public only	Both – Public only
14. Need considered?	WGTA – No mention CESPA - No, legislative impact may be negative	Both - Yes
15. Alternatives considered?	WGTA - Yes, five alternatives considered CESPA - No, US provision not discussed	PPRs - Yes, but more efficient / environmental options available YTRs - Yes, but economic cost to industry main issue
16. Consistent application?	Both – Not clear	Both - Not clear
17. Flexible application?	Both – Not clear	Both - Not clear
18. Participants duties clear?	Both – Yes	Both - Yes
19. Public participation?	WGTA - No CESPA - No, consultation began three years before proposal with release of discussion papers	PPRs - No, while 2 years notice in Federal Regulatory Plan exclusion of environmentalist groups YTRs - No, while preceded by release of discussion paper, changes requested by industry
20. EIS public?	WGTA – Yes, tabled in Parliament CESPA – While some documentation available, MC process secret	Both - Yes
21. Decision oriented?	Both - Unclear	Both - Unclear
22. External review?	Both – No, but roles for Environment Committee and Commissioner	PPRs - Auditor General considered effectiveness YTRs - No
23. Mitigation?	Both – Yes, in legislation	Both – Yes, in legislation
24. Monitoring?	WGTA – Yes, SEA made recommendations for monitoring and data collection CESPA – Yes, three year review mechanism Both - System monitored by CEAA	PPRs - Yes, requirement for an Environmental Effects Monitoring Program. YTRs - Yes, inspections conducted on regular basis. Both - System monitored by CEAA
25. Cost effective?	Both - Yes	Both - Yes

b. Contextual criteria

Table 7.3 below sets out the extent of Canada's compliance with the contextual criteria (see Chapter 6, section 3.2). This illustrates that while the social/political and environmental/economic contexts are generally favourable to legislative EA, the main difficulty lies with the legal/administrative context and the continuing reliance placed upon the use of subordinate legislation. Section 1 above, (which outlines the context of legislative EA), should be cross referenced with Table 7.3 for further information.

Table 7.3: Application of Proposed Contextual Criteria in Canada

Context	Social/ Political	⇒	Environmental/ Economic	⇒	Legal/ Administrative
Objective	Democratic Government	⇒	Sustainable Development	⇒	PPP Implementation
⇓	⇓		⇓		⇓
Principle	Accountability		Integration and Coordination		Use of appropriate legislation
⇓	⇓		⇓		⇓
Criteria	Is information freely available and are there opportunities for public participation?		Is guidance available at all levels and is the most appropriate policy tool used?		Are there opportunities to review and monitor legislative proposals?
Compliance and Comment	Yes, despite a questionable separation of powers, mechanisms are present to secure the necessary accountability. The role of the Auditor General in particular is a crucial one, enabling evaluations to be made by the legislature upon the use of public resources by the executive. The Commissioner for the Environment and Sustainable Development supports this role.		Yes, Canada has made significant inroads here. Environmental accountability has strengthened the general accountability expected of government, and environmental policies are both coordinated generally and integrated reasonably well with their economic counterparts. However national guidance is still needed.		No, there remains a tendency to rely to a large extent upon the use of subordinate legislation. While ironically information is more freely available under RIAS, there is a need for both principal legislation to be used more often, and for freedom of information provisions to extend to the MC process.

Canada's social/political context was outlined in section 1.1. A number of factors were examined there which supplement the role of the Auditor General, and which ensure that Canada complies with the principle of accountability. The *Charter of Rights and Freedoms* 1982, the *Access to Information Act*, and the role of the party system are all extremely important checks on the ability of the executive to exceed its powers. Without public involvement and freedom of information it would be extremely difficult for any individual to bring issues of abuse to the attention of bodies such as the Auditor General. An understanding of the

role of public participation in general is extremely important if the public are to become involved in legislative EA under the Cabinet Directive. However it is important to recognise the limitations inherent in this; cabinet documents remain secret.

Canada's environmental/economic context has procedurally improved significantly since SDSs were introduced and the Government established the Office of the Commissioner of the Environment and Sustainable Development, although whether substantive outcomes are improved remains to be seen. Together with the other developments considered in section 1.2 above, integration and coordination have improved greatly and the Canadian Government may be commended. However there is room for improvement; further guidance is required on the preparation of SDSs, and on the relationship between each of the initiatives outlined. The 'Guide to Green Government' has much in common with the 'Blue Book'; each is more of an initial framework document rather than a comprehensive guidance handbook, and each must be developed further if the momentum for sustainable development is to be maintained.

With regard to the legal/administrative context, Canada fails to comply in many instances with the principle of using appropriate legislation. The use of subordinate legislation is widespread, and if used for PPP implementation, is unlikely to ensure adequate opportunities for review and monitoring. As seen in section 1.3, checks and balances such as the disallowance power are largely ineffective, and opportunities exist for abuse. The Directive is also inadequately coordinated with the RIAS and MC processes, and until it is, assessments of legislative proposals are likely to continue to fail to take account of environmental matters adequately.

Conclusions

The primary conclusion drawn is that legislative EA in Canada contributes to sustainable development by complying with fourteen of the procedural and two of the contextual criteria (section 3.2). While several important criteria are not complied with, there has been sufficient compliance to date to tentatively conclude that sustainable development is advanced because of the integration, coordination and assessment required.

Other conclusions reached fall into two groups which emphasise the need for reform of the Blue Book guidance, and for greater coordination of the procedures within the MC and RIAS contexts. The former involves a reaffirmation of Government commitment, and a greater emphasis on key procedural matters. An analysis of compliance of the four proposals with the procedural and contextual criteria is the basis for this.

The following procedural matters require urgent attention, and should be included in the Directive / guidance: assessments must be proportionate with significance; need and alternatives must be fully considered; public participation and the public release of documentation must be encouraged; and assessments must consider cumulative and indirect impacts. Each of these was emphasised in Chapter 6 (section 3.2a).

The need for greater coordination between procedures and their decision-making context is also very important. There is much overlap between the legal/administrative and social/political contexts; the requirements for freedom of information and public participation of the latter influences whether there are opportunities to review and monitor proposals of the former. It is strongly advocated that subordinate legislation should be used less frequently, that Cabinet confidentiality should not prevent the release of information per se, and that the role of the Commissioner should be expanded to review the Directive regularly (section 3.2b).

Following an evaluation of legislative EA in the Netherlands in Chapter 8, comparative conclusions will be drawn between the Netherlands and Canada in Chapter 9. These will enable conclusions to be reached regarding the transferability of legislative EA from one jurisdiction to another, particularly to Australia. The need for compliance with procedural and contextual criteria will underlie the potential for this.

Chapter 8 - Legislative EA in the Netherlands

Introduction

The purpose of this Chapter is to evaluate the procedures for legislative EA and the context of their operation in the Netherlands. Although the *Environmental Test* (or 'E-test') is comparatively new (1995), it has been sufficiently utilised to enable tentative conclusions to be drawn regarding effectiveness. In order to understand the background to the introduction of the E-test, the three contexts within which it operates are considered first; the procedures are then considered in detail; and, finally, the application of the E-test to two specific legislative proposals is evaluated.

The three contexts which influence the operation of the E-test are fully described; as far as practicable, the material is presented in parallel with the contexts for legislative EA in Canada. The social/political context examines the parliamentary system and protection of civil liberties; the environmental/economic context the provisions contained within the National Environmental Policy Plans; and the legal/administrative context the legal and administrative processes.

The E-test is introduced in the next section with discussion of application and objectives, coordination and integration with the Business Effects Test, and administration. Available procedural guidance is then described with reference to the different stages of the process, and how well these correspond with best practice. These are: screening, scoping, adoption, documentation, assessment and review. Each is explained, and the screening and scoping criteria that have been developed are reproduced. The roles of the parties involved are described, before the government evaluations carried out to date are examined.

Finally, experience to date is evaluated with reference to the two examples of legislative proposals assessed. These are the *Decree governing the Disposal of Electrical and Electronic Appliances*, and the *Administrative Order on Combustion Plants*. Both are analysed for compliance with the E-test procedures, and the procedural and contextual criteria developed in Chapter 6. Conclusions are then drawn which will be compared in Chapter 9 with the conclusions reached in Chapter 7.

1. Context of legislative EA

Legislative EA in the Netherlands is carried out under the provisions of the *Environmental Test* 1995 (the 'E-test'). The background to the E-test was described in Chapter 4, section 3. The purpose of this section is to consider the contexts that underlie the operation of the E-test in the Netherlands; and analyse whether the objectives, principles and criteria required for the effective functioning of legislative EA are present, and are met. This will serve as an introduction to the E-test and enable conclusions to be drawn in section 3 regarding the influence of each context upon procedural effectiveness.

1.1 Social/political

The importance of the social/political context underlying SEA in the Netherlands has been described recently, with emphasis given to its influence upon effectiveness:

> In communicating the key features and results of SEA processes, there should be a stronger focus on explaining the decision making context and culture within, and for which, a process has been designed. This should include - if possible - an indication of situations in which it will probably be less effective.[1]

This context may be divided into two aspects: the parliamentary system and the protection of civil liberties. These encompass the same areas as the social/political context of legislative EA in Canada which was described in Chapter 7. Both are vital components of democracy in the Netherlands and serve to increase the accountability of the government to the public. This is ensured by providing opportunities for the public to participate in national affairs, and is facilitated by making information readily available. Both the parliamentary system and the protection of civil liberties are important for the effective functioning of the legislative EA process; guiding its development and implementation, and providing wide-ranging opportunities for public involvement.

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1 Tonk, J, and Verheem, R, 1998. 'Integrating the environment in strategic decision making: one concept, multiple forms', *Paper given to the Annual conference of the International Association of Impact Assessment*, Christchurch, p 9.

a. The parliamentary system

The Netherlands 'decision-making context and culture' is largely determined by the existence of a constitutional monarchy, unitary system and bi-cameral parliament. Articles 50-72 of the 1983 Constitutional Statement set out the fundamental components of the parliamentary system.[2] A separation of powers exists between the legislature (States General), executive (Council of Ministers and Council of State), and judiciary (Supreme Court). The legislature consists of an Upper House, known as the First Chamber (or Senate), and a Lower House, known as the Second Chamber.[3]

Members of the government may not sit in the legislature, and it is unusual for cabinet members to have first sat as Members. Should a conflict arise, the Council of Ministers has the power to dissolve either or both Houses before its term has expired. The separation of powers is therefore greater in the Netherlands than under a Westminster parliamentary system, (such as Australia and Canada), which draws ministers from the party with the greatest number of seats in the legislature.

Election to the Lower House is by proportional representation (PR), while the Upper House remains indirectly elected by the Provincial Councils.[4] PR contributes to the accountability of the government to the public, because it results in a large number of political parties. These consist of both well established and more recent groups, and ensure that a full range of values and interests are represented in the legislature.[5] By contrast, most legislatures based on the Westminster system incorporate the 'first-past-the-post' electoral system, which tends to be dominated by a few traditional parties. This makes it extremely difficult for new political parties

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2 For an early treatment see van Raalte, E, 1959. *The Parliament of the Kingdom of The Netherlands* Government Printing and Information Office, The Hague.

3 For a discussion of the relationship between the States General and the European Parliament - which gives an insight into many societal values held, see van Schendelen, R, 1979. 'Cue-processes and the relationship between the European Parliament and the Dutch Parliament' in Herman, V, and van Schendelen, R, (ed), *The European Parliament and the National Parliaments*, Saxon House: Farnborough.

4 Daalder, H, 1987. 'The Dutch Party System: From Segmentation to Polarization - And Then?' in Daalder, H, (ed), *Party Systems in Denmark, Austria, Switzerland, The Netherlands and Belgium*, Frances Pinter, London, pp 215-216.

5 For a discussion of the Green Left grouping, see Voerman, G, 1995. 'The Netherlands - Losing Colours, Turning Green' in Richardson, D, and Rootes, C, (ed), *The Green Challenge - The Development of Green Parties in Europe*, Routledge: London.

to obtain the majority of votes needed to secure seats in the legislature.[6] It also often results in drastic policy changes, as elections favour one of the main parties and then the other. PR may avoid this and ensure greater policy continuity.

The Council of State is the most senior advisory body to the monarch, and consists of Ministers appointed by the Queen on the recommendation of the Council of Ministers. The Council of States role is an honorary one, although it must be consulted on all draft legislation. If no other means of action is available, members of the public may appeal to it against decisions of national, provincial and municipal authorities.[7] As it is an unelected body its legitimacy may be questioned, however there are useful opportunities for the public to appeal to it, and for it to be involved in reviewing legislative proposals (see section 1.3 below). There is no comparable body under Westminster systems, where traditionally the elected government advises the monarch, although the latter retains largely symbolic power.

Finally, the Supreme Court is responsible for ensuring that Members of the States General and Ministers exercise their powers lawfully, and plays an important role in the protection of civil liberties (described in section 1.1b below). The power of the Supreme Court derives from the Constitution, although it is also to uphold the rights and responsibilities contained within it.

b. Protection of civil liberties

The original Constitution of 1848 made explicit provision for civil liberties, and granted freedom of religion, the press, association and assembly. These rights continue today, and are supplemented by a 1978 legislative provision which provides for freedom of information. Together with a later constitutional provision for public access which was introduced in 1983, this serves to emphasise that the Dutch have been particularly strong

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6 Exceptions to this occur only when a new party gains strength in a particular area. Examples are the One Nation Party in the Australian State of Queensland, and the Reform Party in federal Canada, which is particularly strong in western Canada (see Chapter 7, section 1.1b).

7 Under the *Administrative Jurisdiction (Government Orders) Act* 1976.

advocates of civil liberties in general and freedom of information in particular.[8]

A National Ombudsman was established by statute in 1982. Appointed by the Lower House,[9] this met the need for an independent institution to investigate how the government treats individual members of the public in specific cases. The General Chamber of Audit also has an important role to play in ensuring accountability. Governed by statute,[10] it works independently of government or parliament. Investigating the legality of government expenditure is a key function, and part of this includes an assessment of the way in which the government's policy objectives are being realised.

1.2 Environmental/economic

In 1989 the Netherlands Government laid out its environmental objectives in the first National Environmental Policy Plan (NEPP 1).[11] Entitled *To Choose or To Lose,* the following year the Second Chamber endorsed this. The national sustainable development strategy (NSDS) of the Government, it was followed by NEPP Plus, an interim measure to ensure continuity at a time of political change, and NEPP 2, which was debated in parliament in 1994. Each of the NEPPs are guided by the objective of sustainable development, with targets set in advance. Carley and Christie comment on the significance of NEPP 1:

> The National Environmental Policy Plan (NEPP), published in 1989 by the government of the Netherlands, is perhaps the most striking example to date of long range policy making in environmental management at the national level. Inspired by the vision of sustainable development set out in the Brundtland Report, the NEPP analyses the challenges posed by environmental problems and sets out policy goals for the next twenty years, cutting across administrative boundaries, economic sectors and levels of activity from the local to the international.[12]

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8 Note however the judgement of the Netherlands Council of State delivered on 7 July 1995 in the *Metten Case*, which again denied access to EC documents held by the national government despite the provisions in the *Dutch Act on Open Government*; see Oberg, U, 1998. 'Recent developments in public access to documents held by European Community institutions', 74 *Freedom of Information Review*, p 22.

9 Under the *National Ombudsman Act* 1982.

10 Under the *Government Accounts Act* 1976.

11 Government of the Netherlands, 1989. *National Environmental Policy Plan.*

12 Carley, M, and Christie, I, 1992. 'The Netherlands National Environmental Policy Plan' in *Managing Sustainable Development*, London: Earthscan, Chapter 13, p 249.

Each of the NEPPs establish a national framework for integrating and coordinating environment and economy, and contain guidance as to how this is to be achieved through a mix of policy tools. The NEPPs represent the best examples of NSDSs available, and since the introduction of the *Environmental Management Act* in 1993 (EMA), have tiered with provincial, regional and municipal policy plans and programs (see section 1.2b below). This is an important illustration of best practice in environmental policy, planning and management, as it ensures that other PPPs are integrated and coordinated with one another. The NEPPs themselves are described in some detail below. In common with Chapter 7, the NEPPs contain provisions to ensure that matters of environmental accountability, coordination of environmental policy and integration of environment and economy are adequately addressed.

a. NEPP 1 and NEPP Plus

Impetus for the first NEPP came from the 1983 *Brundtland Report*, and shortly afterwards a national scientific report entitled *Concern for Tommorrow* followed. This pointed out the shocking consequences of continuing with existing policies. Initially the government was reluctant to set the necessary targets and measures required by the report, although it accepted the objectives contained within. Eventually it recognised the need for strict controls, with stabilisation of carbon dioxide emissions at their current level in the year 2000 regarded as an early priority. Carew-Reid et al comment:

> The Netherlands National Environmental Policy Plan is radical. It calls for massive reductions in many emissions and wastes within a generation, backed by major clean-up of contaminated sites, to restore and maintain environmental carrying capacity. Targets and schedules provide a means of gauging success and reinforcing the commitment to environmentally responsible decision-making.[13]

Distinct timescales were used to set out short term policy proposals, medium term strategic goals, and long term aspirations to 2010. Analysis of environmental change was to be on five different levels: local, regional, fluvial, continental and global, with recognition given to overlap between. Integrated policy-making was emphasised, and the use of techniques

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13 Carew-Reid, J, Prescott-Allen, R, Bass, S, and Dalal-Clayton, B, 1994. *Strategies for National Sustainable Development: A Handbook for their Implementation*, International Union for the Conservation of Nature/International Institute for Environment and Development/Earthscan: London, p 37. See also Johnson, H, 1995. 'The Netherlands: Each Generation Cleans Up', in Johnson, H, *Green Plans: Greenprint for Sustainability'*, University of Nebraska: Lincoln, pp 45-60.

such as integrated pollution control, (whereby the impact of pollution on both land, water and air are treated together), was recommended. Key environmental themes included climate change and waste management, and the transport sector and agricultural producers were identified as target groups.

The relationship of energy conservation to sustainable development was particularly important. Taking the Brundtland definition that '[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs', it was stated in NEPP 1 that this goal could be met through:

- closing substance cycles (chain management)
- improving energy efficiency (energy extensification)
- increasing product life etc. (quality improvement)[14]

In the same year as the NEPP's introduction, the Dutch coalition Government fell from power as a result of the Liberals' opposition to the abolition of tax relief for consumers (contained within the NEPP). Cross-party support for the NEPP followed, and the new administration strengthened the NEPP through a supporting program known as NEPP Plus, which appeared in June 1990. This called for a more rapid implementation of many policies, together with more ambitious emission reduction targets, and subsequently received parliamentary approval.

b. NEPP 2

NEPP 2 was designed to speed up the process further, and was introduced under the provisions of the EMA. This provided an obligatory, statutory basis for the NEPPs, with sections 4.3 - 4.6 describing the purpose of the NEPPs, and section 4.3(2) defining sustainable development:

> The plan shall contain the main elements of the government's environmental policy, which is principally concerned with development which will meet the requirements of the present generation, without endangering the opportunities of future generations for meeting their own requirements, and with attaining the greatest possible level of protection of the environment. Possible developments in society and the quality of the environment desired

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14 Lenstra, W, 1991. 'The Role of the Netherlands National Environmental Policy Plan (NEPP) in Energy Policy' in Barker, T, (ed), *Green Futures for Economic Growth: Britain in 2010*, Cambridge Econometrics: Cambridge, p 99.

> in the longer term, as well as international developments with a bearing on these, shall be taken into consideration in the plan.[15]

NEPP 2 was strengthened by this statutory basis, and it continued to emphasise the environmental themes, target groups, policy instruments and integration recommended under NEPP 1. It also expressed concern for economic and spatial implications. 'Spatial' implications refer to the relationship between forward/strategic planning and the environment, with consideration given to the link between the NEPPs and the policy documents released on physical planning. Policy documents dealing with water management, energy conservation and transport were also expected to integrate with the NEPP.

In order to achieve the objective of sustainable development set out in NEPP 1, NEPP 2 considers three specific aspects which form themes running through the entire document. These are strengthening implementation, introducing additional measures where objectives will not be met by existing policy, and ensuring sustainable production and consumption. Implementation is particularly significant, and concentration upon this sets the Netherlands apart from other nations, as the government views sustainable development as an achievable goal, limited only by political will.

The NEPPs are to be prepared at least every four years, and be approved by the Ministers and the States General prior to coming into force. Under section 4.7 of the EMA, a 'national environmental policy programme' is also to be prepared. This is required on an annual basis, setting out the program of activities for the protection of the environment in the next four years. It is designed to guide government actions for this period, as well as anticipated actions in the subsequent four year period. Economic, social and environmental impacts of the plan in this eight year period are to be indicated.

There is a requirement in section 4.7d of the EMA to report on progress made with implementing the present NEPP. This is especially significant, because it enables success with existing environmental policy to be evaluated, which has much in common with state of the environment reporting (SoER), (see Chapter 2, section 1.1b). A related process known as 'Assessment 1994' is required to evaluate progress in implementing the

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15 Section 4.3(2) *Environmental Management Act* text of Act as updated August 1, 1996.

Fourth Policy Document on Physical Planning.[16] Although there is not a requirement under the EMA for SEA of proposed policy plans, there is some support for this, and requirements may be introduced at a latter date under the E-test.[17]

A reason for the emphasis on environmental issues in the Netherlands is the strong support given to it by the public.[18] Non-governmental organisations like Friends of the Earth Netherlands play an important role in generating this, and keep the pressure on the government to maintain its strong stance.[19] Coordination of environmental issues is also well advanced, with the Ministry of Housing, Spatial Planning and the Environment (VROM) playing an important role.[20]

The EMA has also established and institutionalised a number of influential advisory bodies, (such as the Environmental Management Council and Commission for Environmental Impact Assessment),[21] in a single legislative framework.[22] A tiered structure to policy planning is also set out in the EMA,[23] together with provisions for EA and some aspects of SEA, and measures to deal with licensing and waste management.

1.3 Legal/administrative

Legislation in the Netherlands is divided between principal and subordinate/delegated legislation. The former consist of binding rules laid down by the government and the States General, and the latter of binding

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16 Ministry of Housing, Spatial Planning and the Environment, 1994. *The Netherlands' National Environmental Policy Plan 2 - The environment: today's touchstone.*

17 This was confirmed in an interview with Jaap de Boer, J. *Personal Communication*, September 1996.

18 Note however that the Dutch government has its own critics. See Tuinga, E-J, 1994. 'Going Dutch in Environmental Policy: A Case of Shared Responsibility', 4(4) *European Environment.*

19 See Friends of the Earth Netherlands, 1996. Sustainable Development Revised: Sustainable Development in a European Perspective, Friends of the Earth Netherlands: Amsterdam.

20 de Vries, Y, 1996. 'The Netherlands Experience', in Jaap de Boer, J, and Sadler, B, (ed), *Environmental Assessment of Policies: Briefing Papers on Experience in Selected Countries*, Ministry of Housing, Spatial Planning and the Environment: Zoetermeer, pp 67-79, where the Environment Ministry's cooperative approach with the other ministries is stressed.

21 Alongside consultation, environmental planning is the second key aspect of the Dutch approach to environmental policy, both of which together ensure coordination of initiatives, see de Vries, ibid.

22 The *Environmental Management Act 1996*; EA screening provisions are set out in the *Environmental Impact Assessment Decree 1994.*

23 See also Carley and Christie, op cit n 12 and Lenstra, op cit n 14.

rules laid down by state, provincial or municipal authorities.[24] As the E-test is applied to both types of national proposals, it is necessary that these processes are understood.

a. The legislative process

Both the government and Lower House may initiate legislation, although in practice most bills are submitted by the government. Under the 1848 Constitution the Lower House may initiate,[25] amend and modify legislation.[26] Whether introduced by the executive or legislature however, the procedure is broadly the same. Proposals are first submitted to the Council of Ministers, together with an Explanatory Memorandum, which sets out the reasons for it. If approved, the Council of State will then consider it before it is submitted to the States General for a detailed examination. The legislature generally has complete control over this, and sets the agenda.[27] This helps ensure accountability as it can decide which legislation should be considered.

A committee is established from members of the Lower House to make a preliminary examination of the proposal; usually a standing committee, it will produce a provisional report. The Minister who has introduced the bill will respond in a Memorandum of Reply, and may attach any amendments considered necessary. The committee will next produce a full and final report, and the bill will then be ready for public debate in the Lower House. Alternatively, the committee may convene an enlarged meeting with the government to resolve any issues prior to the House debate.

The parties in the Lower House initially consider the bill in its entirety, and then proceed to a clause-by-clause discussion. If passed, it will be sent to the Upper House where the procedure is duplicated. The only important differences between the Lower and Upper House are that in the latter there is no system of enlarged committee meetings and it has no right of amendment. It is therefore only able to accept or reject a bill in its entirety. MPs must either endorse or reject a proposal, and it is not possible for

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24 For assistance with regard to background here, I am grateful to Katinka Jesse, PhD student, Law Faculty, Tilburg University.

25 Which permits it to introduce legislation if the government is omitting to do so

26 Eldersveld, S, Kooiman, J, and van der Tak, T, 1981. 'Elite Views on the Functioning of Parliament' in *Elite Images of Dutch Politics*, University of Michigan Press: Ann Arbor.

27 Gladdish, K, 1990. 'Parliamentary Activism and Legitimacy in the Netherlands' in Norton, P, (ed), *Parliaments in Western Europe*, Frank Cass: London, p 108.

them to abstain. After the Upper House has passed the bill it will then be sent to the monarch for formal approval. The relevant minister or ministers must also countersign the bill, as it is the government and not the monarch that is responsible for it.

b. The administrative process

With regard to subordinate legislation, like many other jurisdictions regulations are used by the government to implement many matters of detail under the authority given to it by principal legislation. However the 'Henry VIII Clause' is not used in the Netherlands, and together with the opportunities that are present to review the passage of principal legislative proposals, it appears that policy matters are implemented appropriately.

A procedure also exists which enables the Second Chamber to inspect subordinate legislation to ensure it conforms with the principal Act. Known as 'voorhangprocedure', it allows the Second Chamber to redraft provisions to ensure conformity. This helps ensure that the government is made fully accountable to the parliament.

2. The E-test procedures

In Chapter 4, section 3 the background to the E-test was described, in the context of related SEA developments. The purpose of this section is to look at the emergence of the E-test as a distinct SEA process, tracing its origins and looking to the future. The E-test will be examined in detail, with particular reference to the procedural guidance available, and the practice with it in the last three years.

2.1 Introduction of the E-test

a. Application and objectives

In October 1995 the E-test came into operation. It is applicable to both principal and subordinate legislative proposals, provided they are national in origin. In contrast with Australia, Canada and other common law jurisdictions where regulations only refer to subordinate legislation, in the Netherlands both principal and subordinate legislation is collectively termed 'regulations'. These include 'primarily draft regulations such as

Acts, Implementation Ordinances or Ministerial Decrees, plus proposals for amendment.'[28]

The original objective of the E-test in 1992 was the early consideration of all significant policy impacts, by utilising the precautionary principle and integrating environment and economy. It was therefore designed to have a three-fold function: as a preventative information gathering instrument, as a coordination instrument, and as a policy instrument.[29] Each of these was designed to advance sustainable development:

> The objective of the E-test is that the environmental interest is considered on a par with other interests (eg social, economic) in developing policy plans and in decision-making on these. This will help to prevent environmental problems as not intended side effects of policies and to make government policy more sustainable.[30]

The same objectives continue to apply after the introduction of the E-test in 1995, although the government decided initially to limit the application of the process to new legislative proposals.[31] However there is scope for it to be applied to other policy proposals or to existing legislation as experience is gained, as NEPP's 1 and 2 recognise that a similar test could also be applied to existing legislation or policies generally (see Chapter 4, section 3.2).[32] In accord with the original proposal, the E-test is to be applied by the initiating ministry, and an Environmental Paragraph is required to accompany submissions to the Council of Ministers.

A particularly important objective of the E-test is what has become known as the 'external integration' of environmental policy. This is designed to ensure that environmental factors have a role to play in all areas of life. In contrast with the 'internal integration' of these factors through the use of specific environmental protection measures, such factors are treated

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28 Ministry of Housing, Spatial Planning and the Environment, 1996. *The Environmental Assessment of Policies: A Basic Guide*, question 2; see Appendix 1.

29 Advisory Committee on the Environmental Test, 1993. *Advisory Report of the Committee on the Introduction of an Environmental Test and an Environmental Paragraph for National Government Policy Proposals*, pp 4-5.

30 Van der Lee, R, 1992. 'The Environmental Test for Policy Proposals', In *The Netherlands – Canada Workshop on Environmental Impact Assessment: Proceedings of the Workshop*, Ministry of Housing, Spatial Planning and the Environment, The Hague, p 147.

31 See generally Tonk, J, 1998. 'Paper to intergovernmental forum on the environmental assessment of policy: the Dutch experience', *International Association for Impact Assessment Annual Conference*, Christchurch.

32 Burger, B, 1992. 'The Environmental Assessment of Existing Policy Areas', in *Proceedings of the Netherlands/Canada Workshop on Environmental Impact Assessment*, Ministry of Housing, Physical Planning and Environment'; and Verheem, R, 1992. 'Environmental Assessment at the Strategic Level in the Netherlands' 7(3) *Project Appraisal*, pp 154-155.

equally with economic ones (see Chapter 3, section 1.2a). The combination of the E-test with the BET in the assessment of legislative proposals is a good example of this (see section 2.1b below).

b. Coordination and integration of the E-test with the Business Effects Test (BET)

The link between environmental and economic policy is a close one in the Netherlands, and the use of the E-test and BET in tandem is illustrative of the coordination and integration of both. Although the BET has been formalised through the MDQ, it has been a requirement since 1992 pursuant to 'Instructions for [drafting] Legislation and Regulation'. These are additional requirements for all legislative proposals, and include: imposing charges upon citizens, companies and institutions, (instruction 13); compliance with European and international law, (instruction 254); and consequences for trade and industry and lower public authorities, (instruction 256).[33]

The Economic Secretariat at the Joint Support Centre for Draft Regulations, (the 'help desk', see section 2.1c below), has set out ten questions and answers on the BET which describe its role.[34] Briefly, these indicate that the BET is concerned with legislative proposals which impact upon businesses, market operations, and socio-economic development. Other questions on the BET which deal with matters of procedure are identical to E-test procedure, and these are described in section 2.2 below.

The Ministry of Economic Affairs (MINEZ) has produced a detailed checklist of the seven questions which are used for screening and scoping proposals for economic effects.[35] These questions include numbers of businesses involved, costs and benefits of the proposals, consequences for market operations, social effects on employment and economic effects on production, a 'foreign test' considering similar legislation of the Netherlands competitors, and more detailed aspects of individual impacts. These suggest that a wide range of potential economic impacts result from

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33 State Gazette 1992, 230, cited in Enclosure 1, Ministry of Economic Affairs, 1997. *BET Checklist: Questions for the testing of draft regulations on business effects*, The Hague.

34 Joint Support Centre for Draft Legislation, undated. *The Business Effects Test in Essence, Information Sheet.*

35 Ministry of Economic Affairs, 1996. *BET Checklist: Points for attention in the testing of draft legislation for effects on businesses*, The Hague.

legislative proposals, which, when considered alongside environmental impacts, enable the decision-maker to evaluate the potential of any proposal to contribute towards sustainable development.

c. Administration

The Joint Support Centre for Draft Legislation, (the 'help desk'), was established in 1995, between the Ministry of Housing, Spatial Planning and the Environment (VROM) and the Ministry of Economic Affairs (MINEZ). Environment and economic secretariats are established within the help desk, with VROM overseeing the application of the E-test, and MINEZ the BET. Additionally, the Ministry of Justice considers the enforceability and feasibility of draft legislation. In a memorandum, the help desk comments on legislation and the impacts that may follow its implementation:

> The main aim of legislation is to generate positive social effects. In many cases, however, legislation may also have unintentional (side) effects, the scale and nature of which are not clear in advance. Legislation can therefore unintentionally undermine the main aims of policy.[36]

The aim of the help desk is to assist VROM and MINEZ by promoting guidance on the new procedures (see section 2.2 below), managing networks of expertise, sponsoring research where necessary, and assisting the Ministry of Justice, which is concerned with reviewing compliance (see section 2.2b). The Minister for the Environment coordinates the process, and evaluates the adequacy of the information produced, together with its consistency with existing environmental policy goals.

2.2 Procedural guidance

Guidance on the E-test has been issued by the help desk, with answers to the ten most asked questions being provided.[37] These make it clear that although the process is being limited to legislative proposals to begin with, there is flexibility for it to be applied to other policy areas.[38] They also indicate that the basis for assessment may well be given legal force in the

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36 Joint Support Centre for Draft Legislation, undated. *Memorandum*, p 1.

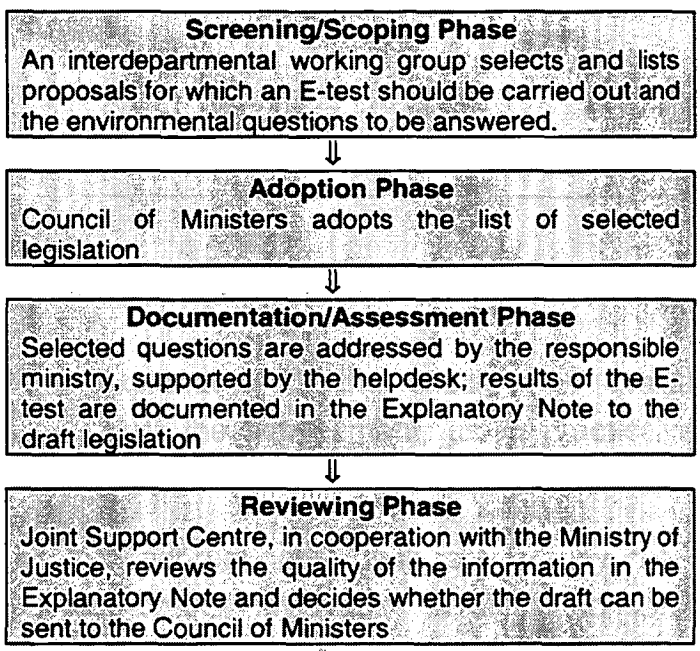
37 Joint Support Centre for Draft Legislation, undated. *The Environmental Assessment of Policies, Information Sheet.*

38 See Burger, op cit n 32, and op cit n 35/37, question 3.

future.[39] A detailed explanation of the checklist is available, which describes how to conduct the assessment, using practical advice and examples.[40]

The legislative EA procedures have been set out by the help desk indicating each of the parties involved.[41] A simplified version of the environmental procedures are set out by Tonk and Verheem in Figure 8.1 below, where four main phases corresponding with EA procedure are emphasised: screening/scoping, adoption, documentation/assessment, and review. Each of these is considered below.

Figure 8.1: E-test Procedure (from Tonk and Verheem, 1998[42])



a. Screening/scoping

An Interdepartmental Draft Legislation Working Group (DLWG) was established as part of the E-test procedural plan, which was designed to implement the E-test and BET under the authority of the MDQ committee. In order to screen legislative proposals for significant environmental

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39 Op cit n 35/37, question 4.

40 Joint Support Centre for Draft Regulations, 1996. *Environmental Test: Points of Interest for the Testing of Draft Regulations on Environmental Effects*

41 Op cit n 37, p 2.

42 Tonk and Verheem, op cit n 1, p 8; procedures are also set out by Formsma, S, 1997. 'The Dutch approach, carrot and stick', *Paper for the Quality of European and National Legislation and the Internal Market Conference,* Session III: Assessment of Draft Legislation, The Hague, p 9.

effects, three or four times a year the DLWG compiles a survey of future legislation together with its likely effects. Known as the 'regulatory overview', this screening process emphasises selectivity, as not all proposals will result in significant impacts. These are termed 'side' effects, which may be either negative or positive. The survey is compiled in accordance with five criteria, which are set out below as Table 8.1.

Table 8.1: Screening Criteria of the Draft Legislation Working Group (Joint Support Centre for Draft Legislation, 1996[43])

1)	It concerns regulations at national level (bills, general administrative orders and ministerial decrees and orders), with the exception of budget bills and initiative bills;
2)	There are substantial (side-) effects on trade and industry, the environment, the judiciary or implementation organisations;
3)	There is national policy space; regulations which result directly from previously established international obligations (for instance EU guidelines) with regard to standardisation as well as implementation are not included in the survey of regulations;
4)	Files which aim at levying taxes, premiums, retributions, legal dues and the like are only included in the survey of regulations if a change of structure is concerned. If it is purely a tariff adjustment, they are not included;
5)	It concerns draft regulations which have not yet come up as such in the cabinet council or a sub-council of the cabinet council.

The five criteria in Table 8.1 establish a list approach to screening legislative proposals. This introduces an important element of certainty as to which proposals are to be assessed, and as such removes the decision from the proponent, the individual department (see Chapter 2, section 2.1d). This is useful, as difficulties of applying SEA to date have often resulted from concerns of accountability, and the reluctance of the proponent to accept that assessment is necessary or falls within its area of competence. The application of the E-test is therefore clearly indicated in the criteria, with exemptions indicated in criteria three and four. Reference to 'national policy space' in criteria three refers to the Netherlands being free to legislate on areas not falling within the jurisdiction of the European Union.

43 Op cit n 40, p 7.

Once the DLWG has carried out this screening process, it consults with the initiating ministry and conducts a scoping process by deciding which of 15 practical questions have to be answered. Four of these relate to environmental impacts, (numbered 8-11, see Table 8.2 below); seven relate to economic impacts, (see section 2.1b above); and the remainder are concerned with legal enforceability and feasibility. The questions are based on the criteria developed for the SEA of existing policies, (see Table 4.1 in Chapter 4), and are designed to 'concretise the mapping out of the environmental consequences of draft regulations' [principal and subordinate legislation].[44] These are duplicated from the help desk guidance, and are separated into four categories, each of which contains a number of sub-questions.

Table 8.2: Scoping criteria - List of points to address when evaluating the environmental impact of draft regulations (Joint Support Centre for Draft Legislation, 1996)

1.	What are the consequences of the draft regulations for energy consumption (question 8a) and mobility (question 8b)?
2.	What are the consequences of the draft regulations for the use and control of the supplies of raw materials (question 9)?
3.	What are the consequences of the draft regulations for floods of waste (question 10a) and for emissions into the air (question 10b), soil (question 10c) and surface water (question 10d)?
4.	What are the consequences of the draft regulations for the use of the available physical space (question 11)?

Each of the scoping criteria are described at length in the E-test guidance released by the help desk. Three variables of energy, biodiversity and space have been identified as underlying the approach of the Netherlands to sustainable development, and each of the E-test questions are directed towards these:

> The questions of the environmental test link up with these three central notions. Energy, [biodiversity] and space are self-evident in the light of what has been mentioned before. The question about floods of waste and emissions into the air, soil and water is of vital importance for the maintenance of species. The environmental policy and the [assessment of the] regulations based on it are [intended] to make that possible.[45]

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44 Op cit n 40, p 12.

45 Ibid, pp 11-12.

Energy concerns are both short term, with regard to how emissions of carbon and nitrogen dioxide affect day to day life, and long term resulting in climate change and acidification. The problem of energy use is compounded; it is needed to obtain and maintain most raw materials, and these fossil fuels are non-renewable. Biodiversity concerns emphasise the interconnectedness of species, including man. Habitat loss is largely responsible for the loss of biodiversity of species, and just as the production of energy resources often underlies this, so also is it related to the third variable, the loss of physical space. This is a particular concern in the Netherlands, which has a similar population size to Australia, but which resides in a far smaller geographical area.

After considering the legislative proposals deemed likely to have significant environmental impacts, the DLWG and proponent department consider the questions to be answered and the amount of information required for each. Emphasis is given to quantifying impacts wherever this is appropriate and practicable. Each of the questions are elaborated in the help desk guidance; this describes the importance of each, how they should be answered, explains any technical terms used, and gives additional sources which may be consulted for further information.

b. Adoption, documentation/assessment and review

After the DLWG has decided which legislative proposals are to be assessed and which of the questions are to be answered, the Council of Ministers adopts the list of proposals as part of its future legislative program. The next stage is for the proponent department to answer the questions and prepare the required information. If this is done early then it is still possible to choose alternatives to preferred policy instruments and types of legislative proposal. Explanatory Notes accompanying draft principal legislation outline the nature and extent of these effects, and Memoranda perform the same function with regard to subordinate legislation.

The help desk and the Ministry of Justice are both involved with reviewing completed assessments. The help desk will judge the quality of the information provided, with the key question in mind of whether the Council of Ministers and States General are able to reached a balanced decision on the basis of the information. If it is insufficient, incomplete, or is not in accord with the four questions on feasibility and enforceability which it has

to answer, (see section 2.2b above), the Ministry of Justice will prevent it from going any further. This is an important sanction, and ensures that the E-test may be enforced by the application of 'sticks' as well as encouraged by providing 'carrots';[46] it is known as the 'legislative review'.[47]

The 1992 recommendation of the Advisory Commission for an independent review body, (the Environmental Review Commission), has not been taken up by the government (see Chapter 4, section 3.2). However the Environment Minister is formally responsible for upholding the quality of the assessment, and whether or not proposals are adopted is ultimately a matter for the Council of Ministers and States General to decide.

2.3 Evaluation

In the twelve months to December 1997, two evaluations were completed, the first of which has been publicly released. Each was based upon interviews with departmental officials, and the first concluded that the process was working quite well. While the amount of detail in the evaluation is limited, it found that the main change from the past was that at least ministries were now assessing proposed legislation, and the phrase 'this regulation involves acceptable consequences for the environment or business' was no longer being used. Greater attention had been given to the influence of the assessment on the final legislative proposal presented to the States General.[48] This is encouraging, as the procedures must result in a balanced assessment preceding the submission of the proposal to the legislature. Without this, the procedures are unlikely to play a role in legislative outcomes, as the legislation itself must contribute to sustainable development substantively.

It is hoped that when the second evaluation is available an analysis of substantive effectiveness may be forthcoming. While beyond the bounds of the thesis, it appears that to date assessment has affected procedures only, particularly during policy preparation. For the test to be fully credible, it needs to be demonstrated that its application is affecting the decision-making process in some way, and that as a result of the decision the

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46 Formsma, op cit n 42.

47 de Vries, Y, 1998. 'SEA of Government Policies in the Netherlands', 16 *EIA Newsletter,* p 2.

48 IME Consult, 1996. *Interdepartmental Working Group on Draft Regulations Evaluation*, Nijmegen.

environment is improved. The limited experience with the tool to date unfortunately does not enable firm conclusions to be drawn with regard to this. Hopefully this aspect will become clearer with experience.[49]

3. Experience to date: 1993-1998

The purpose of this section is to evaluate how the practice of legislative EA in the Netherlands complies with the provisions of the E-test, and the procedural and contextual criteria that were developed in Chapter 6. As a result of selective application and the limited period of operation, by July 1997, just 61 legislative proposals had been assessed under the E-test and BET, and each had been evaluated for legislative feasibility and enforceability.[50] From this small sample, there has been a limited release of public documentation from which to carry out an independent evaluation.

3.1 Compliance with the E-test

The following SEAs on the operation of the E-test are publicly available: the *Decree governing the Disposal of Electrical and Electronic Appliances* (DEAA), the *Bill to amend the Pollution of Surface Waters Act through the introduction of a tax on organo-halogen compounds*, the *Pesticides Act*, the Manure Policy,[51] and the *Administrative Order on Combustion Plants* (AOCP). Most documentation has been released on the DEAA and the AOCP; these are considered below and analysed for their compliance with the provisions of the E-test.

a. Decree governing the Disposal of Electrical and Electronic Appliances (DEEA)

The *Decree governing the Disposal of Electrical and Electronic Appliances* was a proposal put forward by VROM. It was guided by the environmental policy context of the NEPPs; its objective was to promote a high recycling rate for unwanted electrical appliances, (such as refrigerators and washing

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49 de Vries, Y, and Tonk, J, 1997. 'Assessing Draft Regulations - The Dutch Experience' 5(3) *Environmental Assessment* p 38.

50 With regard to the E-test, it appears that only 5% of all draft legislation has been subject to its requirements; see Tonk and Verheem, op cit n 1.

51 These are discussed briefly in Formsma, op cit n 42, pp 11-13.

machines), by the producers and importers responsible for their original sale. After it had been selected for assessment by the DLWG under the screening process, it was required to answer questions 1, 2, 3, 4, 5, 6, 10, 12, 13 and 15 under the scoping process.

Question 10 is the only question dealing with environmental effects, and asks 'what are the consequences of the draft regulations for floods of waste and emissions into the air, soil and surface water?' Interestingly, questions 8, (energy consumption and mobility), and 11, (available physical space), were not required to be answered, even though there was clear potential for impact upon these areas. Energy would be consumed by incinerators and vehicles transporting the appliances, and vehicle use would increase traffic and impact upon existing infrastructure. The assessment of the Decree is therefore a good example of the interrelationship of many of the questions.

Although there was not a specific requirement to answer each question, it was necessary nonetheless to consider each as their importance became apparent during the assessment. This identified likely environmental impacts as emissions resulting from incineration, and waste caused by landfill. These were documented in the Explanatory Note to the draft legislation, and following review by the help desk and Ministry of Justice, the proposal was forwarded to the Council of Ministers.

b. Administrative Order on Combustion Plants (AOCP)

The *Administrative Order on Combustion Plants* was another proposal put forward by VROM; the environmental policy context of the NEPPs again guided the assessment, with the objective to further reduce nitrogen dioxide emissions of new small industrial heaters. The Order was selected in the regulatory overview, and the questions to be answered were decided by the DLWG in consultation with VROM.

After the proposal was adopted by the Council of Ministers, the assessment phase documented the effects of the use of raw materials by the plants and atmospheric emissions released from them. MINEZ was concerned during the development of the proposal about the ability of industry to cope with the proposed maximum emission levels. The help desk played an intermediary role in discussions between VROM and MINEZ on reviewing the effects of the Order. Through financing

independent research, useful further insights were gained which contributed to discussions in Cabinet.[52]

This illustrates the importance of establishing the helpdesk within MINEZ, as it is well placed to ensure that the environment is integrated within the policies of the principal economic department of government and so furthers 'external integration'. There is likely to be less opposition to the coordinating role of the helpdesk if it is perceived not as a threat from outside, but as a body within, over which some influence may be exercised. The objective is to ensure a balancing of environmental and economic interests, and together with the role of the Environment Minister in upholding the quality of assessments undertaken, (and the environmental interest), the approach has much to recommend it.

3.2 Compliance with procedural and contextual criteria

The purpose of this section is to evaluate the compliance of the legislative EAs of the DEAA and the AOCP under the E-test with the twenty five procedural criteria developed in Chapter 6 (see Table 6.22), and the contextual criteria also developed there (see Table 6.23). The first provide a useful check on the range of procedural matters that should be included within the assessments; the second provide a cross-check of the underlying contextual factors which are likely to play an important role in influencing them.

a. Procedural criteria

Applying the procedural criteria to the legislative EAs under the E-test produces mixed results. While it is clear that many of the criteria are formally complied with, others are only complied with informally as part of the legislative or political process. The criteria are set out below in Table 8.3, and commentary is provided both within the table, and elsewhere.

Seventeen of the criteria are complied with by the assessments of the DEAA and the AOCP. These are: provision for an environmental policy context (1), clearly defined objectives (2), regulation by policy instrument (3), adequate support and guidance (4), self-assessment (5), environment considered during policy formulation (6), assessment proportionate with

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52 See Tonk and Verheem, op cit n 1, p 9.

significance (7), clear terms of reference (8), timetable outlined (9), application to socio-economic effects (10), application to cumulative/indirect effects (11), consideration of need (14), consideration of alternatives (15), consistent application (16), flexible application (17), clear responsibilities of participants (18) and cost effectiveness (25).

Table 8.3: Application of Proposed Procedural Criteria in the Netherlands

Criteria	Compliance and Comment E-test / BET DEAA and AOCP
1. Environmental policy context?	Both - Yes, NEPP's 1 and 2 and NEPP Plus
2. Objectives clearly defined?	Both - Yes, the general objectives of the E-test are external integration to contribute towards sustainable development DEAA - high recycling rate AOCP - reduction of carbon dioxide emissions
3. Provisions in law or policy?	Both – Yes, in policy, NEPP-2 and letter from the Environment Minister
4. Support and guidance?	Both - Yes, guidance has been released and the help desk plays a useful coordinating role, with the Environment Minister assisting
5. Self-assessment?	Both - Yes, VROM is the proponent
6. Environment considered during PPP formulation?	Both - Yes, during the drafting of the proposed legislation
7. Assessment proportionate to significance?	DEAA – Generally yes, although questions 8 and 11 were not required to be answered AOCP - Yes
8. Terms of reference clear?	Both - Yes, the Working Group uses a checklist
9. Timetable outlined?	Both - Yes, subject to legal/administrative and political process
10. Applies to socio-economic effects?	Both - Yes, under question 7 (and others) of the BET
11. Applies to cumulative/indirect effects?	DEAA - Yes, of transport options AOCP - Yes, all emissions included
12. Applies to PPPs?	Both - No, limited to proposed legislation, but may be applied to other PPPs later; there are other SEA provisions in EMA (see Chapter 4)
13. Applies to public and private proposals?	Both - No, public only
14. Need considered?	Both – Yes, but not specified; will be considered in the legislative process
15. Alternatives considered?	Both - Yes
16. Consistent application?	Both - Yes, although level of assessment is dependent upon the significance of impacts
17. Flexible application?	Both - Yes
18. Participants responsibilities clear?	Both - Yes, but limited to government participants only
19. Public participation?	Both - No, opportunities come as part of the legal and political processes or informally
20. EIS public?	Both - No, Explanatory Notes/Memos are secret documents which accompanying principal and subordinate legislation
21. Decision oriented?	Both - Ideally yes, but position still unclear, future evaluations awaited
22. External review?	Both - No, but the Environment and Justice Ministries evaluate whether sufficient insight into environmental effects given; the help desk can ask for more info and the Justice Dept can prevent the proposal proceeding without. Uncertainties remain about future effects and possibility of bias present
23. Mitigation?	Both - Not specified but likely in legislative process
24. Monitoring?	Both – No, although this may happen in the legislative process or voluntarily; the help desk may become involved in monitoring of the E-test itself in the future
25. Cost effective?	Both - Yes, coordination with the BET designed to achieve this

Criteria not complied with are the application to other PPPs (12), application to private proposals (13), public participation (19), public EISs

(20), decision oriented (21), external review (22) and monitoring (24).[53] To some extent, the majority of these are satisfied by the legislative process to which the test is applied (19, 22 and 24). Others are dealt with in other provisions (12), or are not relevant (13).

It is however notable that of the six principles believed essential for SEA, only two are complied with: significance and alternatives. There is a need for provisions for participation, public documentation, review and monitoring to be incorporated into any future revisions of the E-test; if adequate support and guidance are provided, these may to a large extent be met under the existing legislative process.

b. Contextual criteria

Table 8.4 below illustrates how legislative EA in the Netherlands is affected by the main aspects of context discussed in Chapter 6. As with the use of legislative EA in Denmark (see Chapter 4, section 4.1), subordinate legislation is not generally used to disadvantage the legislature, and there are sufficient checks present in the social/political context to ensure that this does not occur. Coordination of environmental and economic policy is achieved, as each sector understands its dependence upon the other.

Each of the criteria highlight that the social/political principles of accountable government are upheld in the Netherlands, and that the criteria for participation and freedom of information are complied with to a significant extent. Having a clear separation of powers, with constitutional and legal provisions to enforce these aspects, is of great importance in ensuring the future success of legislative EA in the Netherlands. This is aided greatly by the existence of the environmental/economic criteria of available guidance, the use of appropriate policy instruments, and a sound institutional basis, which meet the principles for integration and coordination. Finally, it appears that legislation is used appropriately in the Netherlands, with principal legislation commonly used to implement PPPs, as supported by an active legislature.

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53 It was confirmed in an interview with Yvonne de Vries, Environmental Secretariat, Joint Support Centre, Ministry of Economic Affairs, that the Joint Support Centre may become involved in this in the future *Personal Communication*, Den Haag, September 1997.

Table 8.4: Application of Proposed Contextual Criteria in the Netherlands

Context	Social/ Political	⇒	Environmental/ Economic	⇒	Legal/ Administrative
Objective ⇓ **Principle** ⇓ **Criteria**	Democratic Government ⇓ Accountability ⇓ Is information freely available and are there opportunities for public participation?	⇒	Sustainable Development ⇓ Integration and Coordination ⇓ Is guidance available at all levels and is the most appropriate policy tool used?	⇒	PPP Implementation ⇓ Use of appropriate legislation ⇓ Are there opportunities to review and monitor legislative proposals?
Compliance and Comment	Yes, freedom of information provisions are present under the constitution and in national legislation. There are a number of other ways in which the government is held accountable. First, there is a clear separation of powers under which it is not possible for ministers to sit in the legislature; second, both the Supreme Court and General Chamber of Audit are available to ensure the government exercises its powers appropriately; third, an Ombudsman is present to address individual complaints.		Yes, the use of the NEPPs has done much to foster integration and coordination of policy initiatives. Emphasising 'external integration', and the need for closer links between departments has aided sustainable development. The MDQ initiative has helped, with the use of the Interdepartmental DLWG and the helpdesk. The E-test and BET operating in tandem are a specific example.		Yes, principal legislation is used for the most part, although where subordinate legislation is used, the Second Chamber is able to redraft provisions to ensure they conform to the principal act. The legislature plays an active role in the consideration of principal legislation, which is aided by a system of PR.

Conclusions

The principal conclusion is that legislative EA in the Netherlands contributes to sustainable development, because it assesses impacts at the earliest possible time (section 2.2a), and it integrates the assessment of environmental and economic impacts through the combined use of the E-test and BET (section 2.1b). While there is scope for the social dimension to be addressed in a related 'Social Effects Test', the assessments of each of the legislative proposals evaluated comply with seventeen of the procedural and all of the contextual criteria.

Early assessment of legislative proposals encourages the widest selection of policy alternatives. Although there is no specific requirement for alternatives to be considered, this is encouraged by early assessments. If this proves unsatisfactory, it is always possible for the Ministry of Justice to prevent it going any further, or for the States General to reject any proposal (section 2.2b). Integrating the assessment of environmental and economic impacts is also educative, emphasising the close relationship of departments in progressing towards sustainable development.

The screening and scoping phase is the most developed aspect of the legislative EA procedures in the Netherlands, and the list approach brings certainty and flexibility to the process. The screening and scoping phase illustrates the important roles played by the DLWG and help desk. The interdepartmental DLWG coordinates the assessment of legislative proposals presented by a number of different departments, and where uncertainties arise, the help desk plays a useful role in conciliation in order to facilitate a successful outcome (section 3.1b).

Procedural matters not addressed adequately are provisions for public EISs, external review, mitigation, and monitoring. Consideration should be given to: releasing documentation when issues of confidentiality do not arise; establishing an Environmental Review Commission; and introducing requirements for mitigation and monitoring. All would greatly improve outcomes, and the ability to evaluate them. If sufficient attention is given to the operational context of legislative EA, several of these matters may be remedied without too much difficulty; for instance the States General could review assessments and monitor outcomes, avoiding the need for establishing new institutions (section 3.2).

Chapter 9 - Conclusions

Legislative EA is a tool of environmental policy, planning and management which is of growing significance in a number of jurisdictions. Although difficulties remain, it has been used in Canada and the Netherlands with some success to date. These countries have had the greatest experience with legislative EA, and are in the forefront of EA and SEA development. Each has a keen interest in the environment and sustainable development initiatives of the other, and has demonstrated concern to contribute to sustainable development through the use of legislative EA.

Although the legislative EA systems in both countries differ, comparisons are useful as alternative approaches may be necessary in particular circumstances. The potential for policy transfer to Australia is greater in the Canadian than in the Dutch case, because of similar contextual factors; however the procedural and administrative basis of the Dutch E-test has much to recommend it, and Australia should give careful thought to introducing legislative EA based upon these aspects of the Dutch model.

This chapter draws conclusions which are specifically based upon the research questions posed in Chapter 1. With the exception of the last two, each of these are generally applicable, and are duplicated in Table 9.1:

Table 9.1: Thesis Research Questions

1.	Does legislative EA contribute to the achievement of sustainable development, and if so, how does it do this?;
2.	Should EA procedures be applied to legislative EA, and if so, what are the most important of these?;
3.	Does the legislative process influence the assessment, and if so, does it include procedures which may be equivalent to EA procedures?;
4.	Should legislative EA be introduced by a policy rather than a legal requirement, and if so, why?;
5.	Is it possible to evaluate the implementation of legislative EA to see how well it is working, and if so, how may this be done?;
6.	How effective are the legislative EA processes in the Netherlands and Canada?; and
7.	How effective are Australia's new SEA provisions, and to what extent is Australia able to apply these to legislative EA?

Each of the questions will be answered in turn, and recommendations will be made for improvements where these are appropriate. Recommendations are designed to reform the existing processes to enhance the contribution of legislative EA to contribute to sustainable development.

1. Does legislative EA contribute to the achievement of sustainable development, and if so, how does it do this?

Legislative EA has the same objective as SEA - to contribute to sustainable development. This was indicated in Chapter 3, section 1.2a, after the definitions of both, (and sustainable development in the previous chapter), were examined. It has potential to *integrate* impacts of all types, *assess* them at an early stage of development, and *coordinate* with other policy tools. Each of these is dependent upon *effective guidance*. All of these elements are examined below.

Sustainable development is the integration of environment, economy and society in policy and decision-making, and legislative EA makes an important contribution to this. Only by assessing the impacts from each sector together can the links between them be understood, and consequent negative impacts be avoided or mitigated; this was demonstrated in Chapter 2, section 1.1a.

Most attention has been on the integration of environmental and economic impacts. While RIAS and the MC processes in Canada discuss economic impacts intrinsically, the link between the E-test and the BET in the Netherlands takes a different approach; not only does it combine the consideration of impacts, but in doing so it helps overcome suspicion between the two sectors of government which have traditionally been at odds with each other. This is extremely positive.

Social impacts are usually indirectly included in any assessment with reference to other impacts. If integration is to be comprehensive, it is very important that social impacts must be given adequate attention in their own right. As seen in Chapters 7 and 8, neither the Canadian nor Dutch systems of legislative EA does this, and the requirements must be amended to make appropriate provision for it. In the Netherlands, this could be achieved by the establishment of a 'Social Effects Test', which could operate along the same lines as the E-test and BET.

Assessment of impacts should be timely; it should certainly be before implementation, but also preferably be before or during development. This was argued in Chapter 3, section 4.2. It is an important contributing factor to sustainable development, as it employs the precautionary principle, one of the most important upon which sustainable development is based. Action should not generally be taken until an adequate knowledge base exists, although in certain circumstances it may be essential. In the case of carbon dioxide emission reductions, despite the weakness of baseline data, action may be needed to reduce ill-defined dangers of serious, irreversible damage. Assessment in accord with the principle is particularly important for SEA, as greater uncertainties are present with regard to PPPs than projects.

Coordination is important to avoid unnecessary overlap and duplication, and ensure appropriate accountability; this should be within a framework of strategies, reports and institutions. This was discussed in Chapter 2, section 1.1b. NSDSs need be established to provide guidance for the operation of legislative EA and other policy tools, and the success or failure of such tools should be reported upon periodically in SoERs. Institutions need to be established or adapted to carry out these functions, and attention must be given to the potential for overlap between those responsible.

As seen in Chapter 7, institutions in Canada such as the Standing Committee for the Environment and Sustainable Development and the Commissioner for the Environment and Sustainable Development have extremely valuable roles to play in ensuring accountability; however where uncertainties arise concerning jurisdiction, these must be clarified. The role of the Commissioner with regard to the Cabinet Directive is an illustration of this. In accord with the recommendation of the Interdepartmental Working Group on SEA, the Commissioner should be more directly involved in monitoring the effectiveness of the Directive.

As seen in Chapter 8, institutions in the Netherlands include the important coordinating role of the help desk, which is discussed with reference to the importance of guidance below; however it would be extremely useful if thought were given once more to the establishment of an Environmental Review Commission to provide an independent check upon compliance, which was discussed in Chapter 4, section 3.2. The EIA Commission is extremely well regarded in the Netherlands and overseas for the review

function it exercises towards other proposals, and if any review body were established upon these lines it would be a significant step in the right direction.

There is also potential for greater coordination *between* the framework of strategies, reports, institutions and policy tools. As discussed in Chapter 7, in Canada it has rightly been suggested that SEA may help in the implementation of SDSs, and in both Canada and the Netherlands SEA may be applied to the strategies during their drafting. Such linkages should be explored further, as it is important to avoid policy fragmentation. Evaluation of SEA and legislative EA should be conducted as part of the evaluation of environmental performance generally, so that such links are maintained and remain of relevance. Preparing regular and transparent SoERs, and utilising existing institutions such as the Canadian Commissioner of the Environment and Sustainable Development to report to parliament is particularly important.

The context of sustainable development plays a significant role in the success or failure of legislative EA, for it provides the guidance for the operation of all environmental policy tools. The link between sustainable development and EA was considered generally in Chapter 2, section 2.1e. The thesis argues that without an understanding of the sustainable development context, legislative EA is unlikely to be effective. This was argued in Chapter 5, section 2.2b, and demonstrated with regard to Canada and the Netherlands in Chapters 7 and 8.

Effective guidance must also be prepared on the working of specific tools such as legislative EA. In both Canada and the Netherlands procedures are in place for the implementation of the Cabinet Directive and E-test which include a number of requirements. In Canada these should be supplemented regularly by additional guidance from CEAA, the Interdepartmental Working Group on SEA, Environment Canada, the PCO and TBS. In the Netherlands the Joint Support Centre, DLWG, VROM, MINEZ and the Ministry of Justice each have valuable roles to play in providing useful advice and assistance.

The Joint Support Centre, DLWG and Interdepartmental Working Group should be focused upon in future legislative EA development, as each are extremely important in achieving consensus across traditional ministerial boundaries. In Canada the Interdepartmental Working Group needs to become involved in screening and scoping legislative proposals in the

same way as the DLWG, which would ensure that only those proposals with significant potential impacts are subsequently assessed. This is important to concentrate attention and resources. Without selectivity, there is a risk that the process will fail to assess proposals adequately, with important legislative changes not given the attention they deserve. This is the lesson from the Danish experience that was discussed in Chapter 4, section 4.1.

2. Should EA procedures be applied to legislative EA, and if so, what are the most important of these?

EA procedures have proven effective over a number of years in the assessment of projects and PPPs, and this experience should be built on in the assessment of legislative proposals. Chapter 2, section 2.1d gave an overview of EA procedure, and Chapter 3, section 4.1 indicated some of the difficulties in applying EA procedures to SEA, such as differences in the precision of impacts, levels of detail and time-frames for assessment.

Provided EA procedures are applied flexibly, and account is taken of the different decision-making contexts within which they operate, these difficulties may be minimised. Chapter 5, section 2.2 discussed the different contexts that should be considered with reference to the operation of any EA procedures. The environmental/economic context was discussed in conclusion 1. The social/political and legal/administrative contexts will be discussed in conclusion 3. All are discussed with specific reference to Canada and the Netherlands in conclusion 6.

In Chapter 5, the purpose of effectiveness evaluation, and the use of principles and criteria were considered generally; in Chapter 6, EA and SEA procedures were examined in depth with reference to the principles and criteria that have developed to evaluate systems worldwide. Each set of EA principles were compared with each other, based upon a consideration of criteria that, to a greater or lesser extent, are found within all of them; the same set of criteria were used to compare the SEA principles with each other. It is concluded that these twenty five criteria can and should be used to evaluate systems of legislative EA, because they contain each of the EA procedural elements which are also of relevance to SEA and legislative EA.

It is possible to identify six of these twenty five criteria which are particularly important. Elling has rightly identified significance and alternatives, the production of documentation and public participation as 'fundamental principles of SEA' (see Chapter 6, section 2.3b). To these should be added the importance of review and monitoring, identified by Tonk and Verheem in their 'generic SEA principles' (Chapter 6, section 2.3c).

Through evaluating legislative EA in Canada and the Netherlands in Chapters 7 and 8, it is concluded that although many of the other nineteen principles can be included in an SEA procedure, without question these six are essential to any procedure, whether it is applied to projects, PPPs or draft legislation. They are common to both EA and SEA procedures, and if they are not present any assessment will not be effective.

3. Does the legislative process influence the assessment, and if so, does it include procedures which may be equivalent to EA procedures?

The different context of legislative proposals from other proposals means that it is important that EA procedures be *adapted* rather than simply *adopted.* It is therefore necessary that the experience of other countries be flexibly applied in Australia because of the different social/political and legal/administrative contexts; great caution should be exercised under these circumstances.

The Canadian federal experience is of greater relevance to Australia than the Dutch experience, for there are many similarities between Canada and Australia. However there are also many positive outcomes of the Dutch experience from which valuable insights may be gained. It is therefore very important that rather than 'picking and choosing' particular attributes, each experience is viewed as part of a larger system.

The legislative process has a significant influence upon legislative EA. The importance of freedom of information, public participation, review and monitoring in the social/political and legal/administrative contexts relates closely to four of the key six procedural principles: documentation, participation, review and monitoring. The consideration of alternatives and screening for significance may also be performed as part of the legislative process.

All policies should undergo an initial screening process to ascertain the likelihood of significant impacts. Key issues are then identified and alternative courses of action considered. Following assessment, likely impacts and proposed mitigation measures must be documented. The public should participate in the selection of key issues, consideration of alternatives and subsequent review of documentation. Independent review of the proposal is necessary to counter concerns of bias, especially where the proponent is also the assessor. After review a decision is taken on whether to proceed with the proposal or not. The implemented proposal must then be monitored to ensure that no unexpected outcomes occur.

Understanding the important role that context plays in the assessment of legislative proposals is therefore a key finding of this thesis. It was examined in Chapter 5, section 2.2, and criteria for evaluation were set out in Chapter 6, section 3.2. It is concluded that although its influence on the outcome of any procedure should not be underestimated, it is particularly significant for legislative EA. If the existing legal and political procedures for the assessment of legislative proposals are coordinated with EA procedures, there will be a much greater degree of acceptance. Introducing overlapping requirements is unnecessary where legal and political procedures may already include many of the six SEA principles.

In Canada, Chapter 7 has shown that several of these are already present. Both the RIAS and MC processes require the consideration of alternatives, and impacts are to be described in each. Participation is limited to consultation under RIAS, and is discretionary under the MC process, (as the MC is secret). There are no provisions which state how significance is to be determined, and no requirements for review or monitoring. Although significance depends upon discretion, the House Environment Committee, Auditor General and Commissioner have important roles to play in review, and the legislation itself may require monitoring of its provisions.

In the Netherlands, Chapter 8 has shown that significance is determined by the regulatory overview carried out by the DLWG. Impacts are described in the Explanatory Notes and Memoranda, and the help desk and Ministry of Justice are involved in review, (albeit that they lack independence). There are no provisions for the examination of alternatives, although these may be considered in the legislative process. Opportunities for participation are also limited to influencing

parliamentarians or informal consultation with interest groups. Monitoring may be carried out informally under the legislative process, although the help desk may be given a future role.

4. Should legislative EA be introduced by a policy rather than a legal requirement, and if so, why?

How to introduce legislative EA is an important consideration, and it was discussed in Chapter 3, section 4.3. Provisions have generally been introduced on a 'stand alone' basis, although there is much variety between each jurisdiction. As seen in Chapter 4, those in the US and Finland include other requirements for SEA and EA, those in Canada and Denmark include other requirements for SEA, and those in the Netherlands and the European Commission are separate from both SEA and EA. The Netherlands also has provisions for SEA and EA contained within a statute, and the European Union has provisions for EA and SEA within a directive and a proposed directive.

For four reasons, this thesis concludes that legislative EA should be introduced by policy rather than law: first, legislative EA (and SEA) in the 1990s follows the experience with EA in the 1970s and 1980s, when requirements were introduced by policy directive; second, policy requirements are common to SEA at present, and experience is still growing; third, it is important to establish a basis of practice initially, and not deter policy-makers from using it for fear of litigation; and fourth, it has often made little difference whether EA provisions are given a legal basis or not, if they are still based on discretion and political will is absent.

Many countries originally introduced EA by policy rather than law. These include Canada in 1973 and the Netherlands in 1979. As experience grew in each country, so it was appropriate to establish requirements in law for reasons of clarity and greater certainty. In Canada legal requirements were not introduced until 1995, and in the Netherlands not until 1987. There is no reason why legislative EA should not also be introduced by law at a later time, as processes develop and mature; this has been the experience of EA over a considerable period of time.

In many ways, the experience of SEA during the 1990s has mirrored that of EA in the 1970s and 1980s. Requirements have generally been introduced by policy directive, rather than legislation. Legislative EA has

followed this trend, with the exception of requirements in the US and Finland. It is quite possible that requirements for assessing PPPs will also be given a legal basis, if and when the advantages of doing so become clear.

It is concluded that new requirements should not be formally introduced until the time is right, as flexibility in implementation is very important for legislative EA. In order to encourage its use, it is necessary that there is a greater understanding of the potential of SEA and legislative EA to contribute to sustainable development. It is clear that policy-makers are deterred by legal provisions, and making a start must be the priority. The experience of the Netherlands as described in Chapters 4 and 8 is instructive. Much research and many trials were undertaken before the introduction of formal statutory requirements for EA.

While there is certainly a danger that the flexibility of introducing EA requirements by a policy directive may be taken advantage of by some, this may also be true of legal requirements if discretion is available in the statute. The experience of Australia has shown that despite the introduction of EA and SEA by law in 1974, if political support is absent requirements will not be acted upon. This illustrates the futility of introducing weak legal requirements that cannot be enforced. Provisions should not be enacted until procedures have proved effective, and are supported by those to whom they apply. While Australia's proposed new SEA provision in the *Environment Protection and Biodiversity Conservation Bill* 1998 is a bold step, because of the presence of extensive discretion, its legal basis may therefore prove ineffective.

5. Is it possible to evaluate the implementation of legislative EA to see how well it is working, and if so, how may this be done?

There are no specific methods to measure the substantive effectiveness of legislative EA, and methods for measuring the substantive effectiveness of other procedures are still in their infancy. Following the work of Wathern et al, Davey concludes that demonstrating the link between the use of legislation and environmental outcomes is notoriously problematic, given the interplay of so many variables. Evaluating the effectiveness of procedures and contexts offers an alternative. While environmental outcomes are not directly evaluated, highlighting deficiencies in existing

procedures and contexts improves practice indirectly, as each plays an important role in facilitating those outcomes.

It is concluded that it is quite possible to evaluate legislative EA. Based on criteria for measuring EA, criteria have been developed recently for the evaluation of SEA. These have been described in Chapter 6, and may helpfully be employed to evaluate how legislative EA procedures accord with 'best practice'. This is done by considering whether a number of procedural attributes are found within the process or system established or to be established. The more of the criteria complied with the better, although the importance of the six principles of significance, alternatives, documentation, public participation, review and monitoring is above all emphasised.

This thesis applies these criteria to legislative EA in Canada and the Netherlands in Chapters 7 and 8, and concludes that it is also possible for the contexts that underlie the operation of legislative EA procedures to be measured; this is also discussed in these chapters. It is useful as it illustrates whether legislative EA procedures are likely to be effective or not. The method employed in the evaluation is to link a number of criteria to underlying principles and objectives. Three contexts are identified: social/political, environmental/economic, and legal/ administrative.

If the objectives are to be achieved and the procedures are to work effectively, it is concluded that each of the contextual principles and criteria should be satisfied. The principles are: accountability; integration and coordination; and the use of appropriate legislation. The criteria are requirements for: freedom of information and public participation; the availability of guidance at all levels and the use of the most appropriate policy tool; and available opportunities to review and monitor proposals.

6. How effective are the legislative EA processes in Canada and the Netherlands?

The effectiveness of legislative EA in both countries is measured with reference to the procedural and contextual criteria set out in Chapter 6. In general, compliance with procedural criteria in Canada and the Netherlands is similar. As seen in Chapters 7 and 8 fourteen of the twenty-five criteria are broadly complied with in Canada, and seventeen are complied with in the Netherlands. In many other cases criteria are

complied with indirectly or informally in the political and legislative processes. Of the criteria complied with, the Directive meets only one of the six which are essential, (monitoring); the E-test meets just two, (significance and alternatives). Neither comply with the principles of documentation, participation or review. This is a profound weakness of both systems, and each needs to be developed further to ensure that all six are fully addressed.

There are some opportunities for assessments to be reviewed in both countries. In Canada the potential reviewing role of the Commissioner for the Environment and Sustainable Development, (and to a lesser extent Standing Committee on the Environment and Sustainable Development), has been indicated. However the Commissioner can only operate within established boundaries, and at present a formal review function is not practicable, no matter how much it is needed. In the short term the Commissioner needs to carry out a comprehensive evaluation of the implementation of the Cabinet Directive, especially if CEAA is unable to secure departmental cooperation. Annual evaluations can ensure that momentum is maintained.

In the Netherlands there is provision for evaluation by the Environment and Justice Ministries. However this cannot be regarded as sufficiently 'external' to the decision-making process. As discussed in conclusion 1, there is a need for an independent review body to report to parliament on the success or failure of the E-test, or for the parliament to do this itself.

In neither country is the EIS made public, although in Canada the release of the Public Statement may contain certain details. In Canada under the Directive there is no mention of the consideration of alternatives, although the RIAS and MC processes do contain provisions for this, which may or may not be complied with; the assessment of CESPA indicated that it clearly was not.

The most notable deficiency in both countries is that public participation does not have a role in either procedure at the time legislative proposals are being formulated. Although there may be opportunities for the public to be involved if discussion papers are released, or in the parliamentary process that follows, participation is not a feature of the scoping process unless the minister exercises discretion. Changes need to be made to each system of legislative EA to incorporate this important procedural component.

With regard to context, the objective of democratic government is met to a large extent in both the Netherlands and Canada. Accountability underlies this in each, with information freely available for the public to participate in social/political life. Some criticisms may nonetheless be made of Canada in particular, which impact upon the likely effectiveness of legislative EA. Disclosure of MCs does not occur under the *Access to Information Act,* and for proposals of little controversial significance there is no reason why they should remain confidential. Questions may also be raised regarding the respect of the Government for the *Canadian Charter of Rights and Freedoms* 1982, (see Chapter 8, section 2.1c).

The objective of sustainable development is given prominence in both countries, although there are differences in approach. In the Netherlands the NEPPs integrate and coordinate environment and economy at a national level and set targets to be reached by the whole of government. In Canada the SDSs also integrate and coordinate environment and economy nationally. Both also integrate social concerns with environmental and economic ones. The Canadian SDSs may be criticised as they are limited to particular departments. Little government guidance is available for the preparation of these, and if the 'Guide to Green Government' is to take over the role of the 'Green Plan' in this respect, there is an urgent need for a comprehensive strategy process to be implemented.

Legislative proposals are used in both countries as the main method of implementing PPPs. Although this is mainly principal legislation, subordinate legislation is sometimes used in Canada when the use of principal legislation would be more appropriate. It is important that Acts rather than regulations are used because there are greater opportunities for parliamentary review of Acts. The use of subordinate legislation should therefore be limited to proposals which do not serve to implement policy directly. It should not be used to pre-empt the legislative review function of parliament.

The Dutch E-test and BET were introduced at the same time and are applicable to legislative proposals only. The Canadian Cabinet Directive applies to PPPs as well as legislative proposals. Both systems of legislative EA are applicable to both principal and subordinate legislative proposals. As emphasised in the answers to the research questions 2 and 3 above, it is concluded that because there are differences of application

between legislative proposals and PPPs, while existing EA procedures can and should be used, they should be coordinated with the existing legislative process in both countries.

In Canada the Directive is required to coordinate with two distinct and established processes: RIAS and the MC. It fails to do this in a number of areas because each was designed with different purposes in mind. RIAS was established as a way of considering economic impacts, and the MC was introduced as a way of maintaining Cabinet confidences until decisions had been taken. The Canadian Cabinet Directive needs to coordinate with the MC and RIAS procedures more closely. This is necessary because both are so well established, the government is likely to resist calls for significant change, and because legislative EA is likely to be more effective if environmental and economic impacts are considered together.

It is concluded that both systems of legislative EA must address social impacts to a greater degree if sustainable development is to be more effectively advanced. In Canada RIAS and the MC should contain a wide range of social impacts. These include impacts on: the unemployed, working poor, the disabled, aboriginal people, women, veterans, seniors and youth. However greater thought needs to be given to how RIAS and the MC are to be coordinated with the requirements of the Directive. In the Netherlands question 7 of the BET gives limited consideration to social impacts, but this only relates to employment and wage costs. While other social impacts are considered informally, greater coordination with the E-test and BET should be investigated.

While the Cabinet Directive is only applicable to federal legislative proposals and other PPPs, federalism still causes difficulties for the effectiveness of legislative EA in Canada, and this is also problematic for Australia, which is emphasised in conclusion 7 below. Overlapping federal legislative initiatives are a good example of this, and the problems in establishing endangered species legislation are the best illustration. There remains opposition to this; a small number of provinces have legislative requirements of their own, others have supposedly 'equivalent' requirements (British Columbia), while others resent outright the idea of federal interference on provincial lands (Alberta). The key to legislation is the protection of habitat, and it is necessary that this protection be

Canada-wide if legislation is to be effective. Agreement among the provinces is therefore needed for further progress to be made.

7. How effective are Australia's proposed SEA provisions, and to what extent is Australia able to apply these to legislative EA?

There has been little formal experience of SEA in Australia, as the provisions of the *Environment Protection (Impact of Proposals) Act* 1974 have rarely been applied to PPPs, (see Chapter 2, section 2.2a). There has been some experience with assessing PPPs in Western Australia, (see Chapter 6, section 2.2a), and the inquiries conducted by the federal Resource Assessment Commission have been compared to SEA, (see Chapter 3, section 2.1a).

The *Environment Protection (Impact of Proposals) Act* 1974 introduced a legislated system of EA which incorporated many aspects of procedure necessary for good practice. These include: the consideration of alternatives, provision of documentation, and, in part, participation, review and monitoring. This experience may be used to Australia's advantage in establishing a system of legislative EA which must also include each of these aspects.

Legislative EA is at present carried out informally with the application of ESD criteria to Cabinet submissions, (some of which are legislative proposals), by both the Commonwealth and the States, (see Chapter 3, section 2.2b). The federal Cabinet and Legislation Handbooks need to be updated as soon as possible to ensure that additional requirements for legislative EA are integrated with ESD criteria.

It is concluded that SEA in Australia has significant potential to make a contribution to the advancement of ESD, especially if each of the six key procedural matters are adequately addressed. SEAs should therefore set out and relate to specific objectives, consider alternatives, cumulative impacts and other matters of national environmental significance, be documented in the same forms as other assessments, include detailed provisions for public participation, and be adequately reviewed and monitored.

The *Environment Protection and Biodiversity Conservation Bill* 1998 provides an opportunity to implement each of these procedures by

introducing SEA and legislative EA requirements in the current parliament. While the Bill is a commendable step in the right direction, the extensive use of ministerial discretion may in practice deny the certainty and transparency that a legal framework should bring. To overcome this, a number of changes are needed, which are detailed below.

The proposed requirement should be specifically applied to bills, as recommended by the consultancy report. Effective SEAs of draft legislation comply with many of the international principles through the legislative process. Significance should be decided by a committee, with alternatives and participation a feature of the parliamentary process. If this is done, the legislature will be able to provide the independent oversight that is so urgently needed.

In anticipation of its enactment, Environment Australia needs to prepare comprehensive procedural guidance on how SEA and legislative EA are to be implemented, possibly for future incorporation into regulations to be passed under the statute. ANZECC should also prepare criteria for periodic evaluations; as seen in Chapter 6, Australia has had significant experience of EA evaluation. ANZECC and CEPA, (now Environment Australia), have been involved in the development of criteria for use at the federal level, and Sippe has been actively employing similar criteria for the evaluations of EA and SEA in WA. This experience has been supplemented by the evaluation of Commonwealth EA carried out by the Auditor General in 1992, and the Public Review process by CEPA in 1993.

It is concluded that the presence of each of the three contexts in Australia indicates that legislative EA procedures could be introduced without too much difficulty, (see Chapter 6). Australia has a democratic government which encourages accountability through an active electoral system; there are provisions for freedom of information, and requirements for auditing government performance. A NSESD and a system of SoER exist to provide guidance and coordination to all levels of government. It also uses legislation as the main method of PPP implementation, and this is for the most part used appropriately.

Experience with legislative EA in Canada is of particular benefit to Australia, as the social/political and legal/administrative contexts are so similar. However Australia's environmental/economic context if different from Canada's in a number of key respects; in contrast to Canada, Australia has a national SDS which is to be commended; in contrast to

Australia, Canada has pioneered environmental accountability which is also to be commended. Australia can benefit from the development of the Commissioner of the Environment and Sustainable Development in particular, and consideration should be given to establishing such a National Environmental Commissioner to audit Australian environmental compliance.

Federalism causes similar difficulties in Australia as it does in Canada. The establishment of the IGAE in Australia is paralleled by the harmonisation accord by the Canadian Environment Ministers. Both seek consensus on environmental issues by setting standards, exchanging information and establishing accreditation processes. Although each of these measures promises to improve the outlook on many environmental issues, territorial concerns inevitably remain. Compromise must be avoided if it is of no benefit to the environment. Instead the federal government should take the lead in championing environmental protection, whether there is opposition to this or not.

Legislative EA is an important component of SEA which deserves attention in its own right. More interest will undoubtedly be directed to it in the future in a number of countries, including Australia. It is concluded that if legislative EA is not understood as a distinct assessment process, it will not be effective, as the legal/administrative context is unlikely to be understood. The six procedural requirements identified as essential are also better coordinated with existing legal and administrative processes, which already contain many of these. If these procedural and contextual requirements are present and are well coordinated, the potential of legislative EA to contribute to sustainable development is significantly enhanced.

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Appendices

Appendix 1. The Environmental Assessment Process for Policy and Program Proposals - the 'Blue Book' (Federal Environmental Assessment Review Office, February 1993)

PURPOSE

The purpose of this document is to clearly indicate to all Departments and Agencies that a non-legislated environmental assessment process is required for all federal policy and program initiatives submitted for Cabinet consideration.

The document sets out the scope of coverage and identifies special cases where such an environmental assessment may not be expected. The document details the responsibilities of all Ministers; the Minister of the Environment; the Department of the Environment; the Federal Environmental Assessment Review Office (FEARO) and its successor Agency; and the responsibilities of Department officials in implementing the new policy. The document further provides a reference on methodology including suggested material and reading to consult, and notes the requirements for documentation, public statements, and public consultations.

The Government of Canada, in June 1990, announced a package of reforms to the federal Environmental Assessment and Review Process (EARP). The reforms include the proposed *Canadian Environmental Assessment Act (CEAA)* and a new, non-legislated environmental assessment process that would apply to proposals for policy and program initiatives submitted to Cabinet for consideration.

The Government also decided that a public statement outlining the anticipated environmental effects of a policy or program initiative, which would be determined through an environmental assessment, would, as appropriate, accompany that announcement of the initiative. The statement is a means of demonstrating that the assessment had been undertaken.

The environmental assessment process of proposed policy and program initiatives can complement the environmental assessment process for projects, and demonstrates Canada's commitment to sustainable development. Moreover, this proposal makes good economic sense because it allows identifying and mitigating adverse environmental effects whenever possible early in the decision-making process.

The objective is to systematically integrate environmental considerations into the planning and decision-making process. The environmental information derived from an examination of proposed policy or program initiatives is intended to support decision-making in the same way that other factors (economic, social, cultural) are now considered in evaluating proposals.

SCOPE OF COVERAGE

The following is a listing of the various types of policy and program decisions made by Government, that sets out the general type of environmental assessment to be applied to them.

a. Proposals for policies or programs considered by Cabinet:

These proposals are to be assessed for their environmental implications, where these are relevant. It is estimated that over 75 per cent of Cabinet business is not environmentally relevant and would not generally require an environmental assessment.

b. Proposals considered by Cabinet for projects as defined in the *Canadian Environmental Assessment Act (CEAA):*

All "projects" are to be covered by the provisions of the CEAA, not by the process for policy assessments, including those projects requiring decisions by the Cabinet or a Cabinet committee. However, when Cabinet is considering an early approval-in-principle for a project before an environmental assessment has been done, such approval can be conditional upon completing a later statement.

c. Consideration by Cabinet, or by Ministers on their own authority regarding the development of new regulatory instruments:

For many years, regulations have required the preparation of a Regulatory Impact Analysis Statement (RIAS), which routinely involves comprehensive public and other stakeholder consultation on a range of issues, including the environment. That process will continue unchanged, but the environmental analysis supporting the development of regulations will be enriched through the development of methods and through experience gained in other assessments at the policy level. Adherence to the procedures set out under the Regulatory Policy will be considered to satisfy the requirements of the process for policy and program environmental assessment.

d. Proposals for policies and programs considered by Ministers on their own authority:

Policy and program proposals for decision by a minister within his or her own portfolio without reference to Cabinet will be assessed for their environmental implications where, in the view of the responsible minister, they are considered to warrant an environmental assessment, and, as appropriate, a public statement will be issued.

SPECIAL CASES

There may be exceptional cases where proposals will not be assessed under the process for policy and program assessments. These are:

proposals prepared in response to a clear and immediate emergency where time is insufficient to undertake an environmental assessment. Ministers are individually responsible for determining the existence of an emergency. A disaster relief program might fall in this category, for example;

where the Governor in Council is of the opinion that an environmental assessment would be inappropriate for reasons of national security;

where the matter is of such urgency, for example, for the economy or a particular industrial sector, that the normal process of Cabinet consideration is shortened and even a simplified environmental assessment cannot to be presented; and

Treasury Board Submissions on matters already assessed under a previous proposal to Cabinet, under the EARP Guidelines Order or under the *Canadian Environmental Assessment Act*, and on corporate plans and budgets of Crown corporations, for their ongoing operations.

For the above noted special cases, a follow-up program may be desirable to provide lessons for similar cases in the future.

Policy proposals which are developed specifically for the purpose of environmental protection or improvement, such as the Green Plan, may intuitively appear to not require an environmental assessment and public statement under this process. However, such undertaking can promote and set an example of the government following through on its commitment to assess the environmental effects of all policy and program proposals. Also, an explanation of the manner in which the proposal contributes to the achievement of environmental objectives would be appropriately addressed in this process.

RESPONSIBILITIES

All Ministers are responsible for assessing environmentally relevant policy and program initiatives and where appropriate will issue at the time of the public announcement of the policy or program, a statement about the environmental consequences of such initiatives. Individual ministers are accountable for the environmental consequences of their policy or program initiatives, for the quality of the environmental assessment, and for the content of the public statement.

The Minister of the Environment is responsible for facilitating the process of policy and program assessments, for advising other ministers on the potential environmental effects of policy initiatives before Cabinet decisions are taken and for advising on environmentally appropriate courses of action. This does not constitute either a veto or an approval role.

Environment Canada in support of the responsibilities of the Minister of the Environment, will, in consultation with other departments, establish environmental and sustainable development goals, objectives and policies; will advise other ministers on the potential environmental effects of policy and program initiatives before Cabinet decisions are taken; will provide policy, technical and scientific advice on specific policy and program assessments and on how policy or program initiatives might contribute to environmental and sustainable development goals; and will advise on appropriate courses of action.

The Federal Environmental Assessment Review Office, and its successor Agency will, in support of the responsibilities of the Minister of the Environment, maintain an inventory of federal environmental reviews; provide procedural advice; and, in consultation with other government departments, propose and initiate refinements to the process.

Departmental officials initiating a policy or program proposal to be submitted for consideration by ministers must ensure that an assessment of the anticipated environmental effects is completed, where environmentally relevant.

METHODOLOGY

Much of the methodology for conducting environmental assessments of policy and program initiatives is still evolving. However, the government is committed to the concept in order to ensure that the principles are applied consistently at this early stage of development. In recognition of this fact, FEARO and its successor Agency, in cooperation with federal departments will continue to develop materials which will help in the environmental assessment of policy and program initiatives. This includes suggested methods, manuals and further readings on the subject as required.

DOCUMENTATION AND DISCLOSURE

For environmentally relevant initiatives being considered by Cabinet including the Treasury Board:

a statement on environmental implications should be included in Memoranda to Cabinet, and, where appropriate, in Treasury Board Submissions and other documents submitted for consideration by ministers; and

where anticipated environmental effects are likely to be significant, a more detailed account of the environmental assessment and the rationale for the conclusions and recommendations should be included in the documents supporting the proposal.

Any disclosure of information will be subject to existing legislation, regulations and policies governing the release of information.

PUBLIC STATEMENTS

Ministers will determine the content and extent of the public statement according to the public interest and the particular circumstances of each case, where a statement is required.

The purpose of the public statement is to demonstrate that environmental factors have been integrated into the decision-making process, not to necessarily provide a detailed account of the assessment work undertaken.

The public statement need not always take the form of a separate document but may be part of the announcement of the initiative or decision. However, to ensure consistency, the following are *suggestions* for the public statements on the environmental effects of policy or program initiatives:

Where a proposal is to be considered in a Cabinet Committee, a draft of the public statement could be included in the supporting documentation.

The Communications Plan's Strategic Considerations section of the Memoranda to Cabinet could address what impacts the environmental assessment of the policy or program initiative will have on the public interest and what communications approach is recommended.

Where the initiative obviously has no direct impact (e.g. appointments, remuneration decisions), or when for other reasons no assessment will be completed (e.g.emergencies, national security) no statement is considered necessary.

Where the intent of the initiative is not sufficiently defined to permit credible assessment and is likely to lead to a "project", the statement could affirm subsequent environmental assessment under the purview of the EARP Guidelines Order or the new *Canadian Environmental Assessment Act*, whichever applies at the time.

Where screening indicates that environmental effects are extremely diffuse and cannot be very well identified, estimated or evaluated, (e.g. influx of immigrants) or where impacts have been covered under other assessments (e.g. Treasury Board Submissions for previously assessed projects), the announcement or the Questions and Answers and other communication material prepared in relation to the announcement may need little more than a brief reference to these circumstances.

For initiatives likely to have significant effects, it is suggested that the announcement contain:

a summary of the anticipated beneficial and/or adverse environmental effects of the initiative and their expected significance; and

where relevant, information on the measures adopted to mitigate adverse environmental effects, and on the follow-up program to monitor the initiative's effects over the long term.

PUBLIC CONSULTATION

Public consultation is normally an important component of effective environmental assessment. It is essential for major project assessments but, because of the need to

protect Cabinet confidentiality, it is often very difficult for policy or program assessments. Those involved in the design and preparation of policy and program proposals are encouraged to seek opportunities for public or stakeholder consultation. The nature and extent of public consultation is of course a matter of ministerial discretion.

An opportunity for public scrutiny is provided by the House of Commons Standing Committee on the Environment, whereby any minister can be requested to appear before it to explain the environmental implications of any new policy or program.

Appendix 2: The Environmental Assessment of Policies - A basic guide - the Environmental Test Guidance (Ministry of Housing, Spatial Planning and the Environment, March 1996)

ASSESSMENT OF DRAFT REGULATIONS FOR ENVIRONMENTAL IMPACT

Regulations are primarily designed to initiate positive social effects. However, in many cases, they create (side) effects whose scope and nature cannot be predetermined.

These (side) effects can have consequences for energy consumption, mobility, raw material consumption and raw material stocks, waste streams, emissions into the atmosphere, soil and surface water and the use of physical space. Regulations can therefore unintentionally undermine overall policy aims.

The Explanatory Notes to all draft regulations must therefore indicate the nature and scope of their intended and unintended effects. The environmental assessment is designed to help clarify the impact of draft regulations on the environment.

As stated in its Coalition Agreement, the Cabinet is trying to create a new balance between the need for protection and the need for dynamism. It has therefore launched the Market Function, deregulation and legislative quality initiative, under which it plans to introduce tighter evaluations of draft regulations. New draft regulations will now be subjected to a legislative test and a business assessment (including the 'foreign test') in addition to an environmental assessment. This coordination with the Market Function, deregulation and legislative quality initiative has led to the practical application of the environmental assessment to draft regulations.

The Interdepartmental working group on draft regulations was established as part of the Market Function, deregulation and legislative quality initiative. It uses a special checklist (which incorporates the environmental assessment) to assess draft regulations. The checklist also asks questions relating to the feasibility and enforcement of proposed regulations and their effects on industry.

Using certain criteria, the Interdepartmental working group on draft regulations produces a list of proposed government regulations which could have substantial (side) effects on industry, the environment, the judiciary or implementing organisations. Following consultations with the Ministry responsible, the working group will also state which (side) effects of draft regulations must be included in the Explanatory Notes. This results in a so-called regulatory overview.

It is not always easy to provide a clear insight into the (side) effects of draft regulations. The Ministry of Economic Affairs, the Ministry of Justice and the Ministry of Housing, Spatial Planning and the Environment have therefore decided to issue joint instructions on how to describe the (side) effects of draft regulations. They will also be providing practical assistance. The joint support centre for draft regulations has a secretariat for the business assessment and another for the environmental assessment.

If you would like more information about the environmental assessment, or you have suggestions for improvements, contact:

Joint support centre for draft regulations
Environmental assessment secretariat
p/a Directorate-General for Economic Structure
Ministry of Economic Affairs
Bezuidenhoutseweg 30, Room 470, ALP A/562
P.O. Box 20101
2500 EC The Hague

Tel: 070-379 6842

Fax: 070-379 7403

TEN QUESTIONS ABOUT THE ENVIRONMENTAL ASSESSMENT OF POLICIES

1. Who is the environmental assessment for?

The environmental assessment applies to everyone who is involved with draft regulations.

2. What does the environmental assessment entail?

The environmental assessment evaluates government policy proposals which could have a major impact on the environment. These include primarily draft regulations such as Acts, Implementation Ordinances or Ministerial Decrees, plus proposals for amendment. The environmental impact of other policy proposals, such as plans and policy documents, can also be assessed.

The Minister of Housing, Spatial Planning and the Environment has decided to focus the environmental assessment on draft regulations during its initial period of operation.

3. Is it really necessary to evaluate the environmental (effects) of all policy proposals?

No. The environmental assessment is not applied to all proposed regulations. 'Selectivity' is the watchword when evaluating the environmental impact of draft regulations. The assessment only applies to regulations which could have substantial environmental (side) effects. There is little point in applying it to regulations arising from EU Directives, which the Netherlands has no choice but to implement. The same is true of regulations governing the imposition of taxes, surcharges, fees and dues, which simply involve adjustments in tariffs. The environmental assessment is applied only in cases of proposed structural change.

Nor will the test be applied to all plans and policy documents. The Second National Environmental Policy Plan (NEPP-2) and the Government's Policy Statement specify that an environmental assessment must be applied only if these plans and policy documents are likely to have a significant impact on the environment.

4. Optional or obligatory?

The NEPP-2 (1993-1994 Parliamentary Papers 23560, nos 1-2) and the letter from the Minister of Housing, Spatial Planning and the Environment of 24 April 1995 both state that wherever new policy proposals could involve major consequences for the environment, these consequences must be indicated.

The Cabinet plans to introduce tighter evaluations of proposed regulations in the context of its Market Function, deregulation and legislative quality initiative. These evaluations will examine the impact of draft regulations on industry and market function, feasibility and enforceability, and on the environment. It was this initiative that led to the practical application of the environmental assessment.

5. Where must the 'environmental effects' of draft regulations be declared?

In the Explanatory Notes which accompany every law or regulation.

6. What impacts must be described?

To help identify the types of impact which must be considered, the Ministry of Housing, Spatial Planning and the Environment has compiled a special checklist containing four questions. You will find these further on in the brochure. In April, a booklet will be published containing a detailed explanation of this checklist. It will describe exactly how to conduct the assessment, using practical advice and examples. This booklet will be available free of charge from the joint support centre for draft regulations and from the Distribution Centre of the Ministry of Housing, Spatial Planning and the Environment.

7. Is it always necessary to answer all four questions?

No. That depends on the scope, importance and nature of the draft regulation.

8. How do I know what deserves special attention?

The Interdepartmental working group on draft regulations periodically draws up a list of regulations which indicates the specific checklist questions that must be addressed for each draft regulation. This not only applies to environmental effects but also to possible consequences for industry, feasibility and enforcement. The working group was established by the ministerial commission for Market Function, deregulation and legislative quality.

For further information, simply contact the joint support centre for draft regulations (whose telephone numbers are listed further on in this brochure).

9. Who upholds the quality of the environmental assessment?

The Minister of Housing, Spatial Planning and the Environment is formally responsible for upholding the quality of the assessment, while the Minister of Justice is responsible for the quality of legislation and regulations. In order to be able to assess quality, it is necessary to have insight into the (side) effects of a draft law or regulation.

The Ministry of Housing, Spatial Planning and the Environment and the Ministry of Justice will evaluate whether the Explanatory Notes to a law or regulation provide sufficient insight into its environmental (side) effects. The joint support centre for draft regulations plays a major role in preparing this evaluation, although it is up to the Council of Ministers and Parliament to decide whether or not the proposal is ultimately adopted.

10. What is the purpose of an environmental assessment?

The purpose of an environmental assessment is to explore the environmental aspects of a particular law or regulation at the earliest possible stage in its preparation. This new instrument, which is designed to promote the external integration of environmental policy, is intended to provide insight into the environmental impact of policy proposals. This will make it possible to conduct the decision-making process in a balanced way. And this will in turn improve the quality of legislation.

ENVIRONMENTAL ASSESSMENT CHECKLIST

List of points to address when evaluating the environmental impact of draft regulations:

1. What are the effects of the draft regulation on energy consumption and mobility?

2. What are the effects of the draft regulation on the consumption and stocks of raw materials?

3. What are the effects of the draft regulation on waste streams and atmospheric, soil and surface water emissions?

4. What are the effects of the draft regulation on the use of the physical space available?

If you have any questions about this checklist, contact the joint support centre for draft regulations. You can also contact the support centre for detailed explanations, advice and examples of the assessment in practice.

Call or fax:

Joint support centre for draft regulations; ask for Jos Tonk or Yvonne de Vries.

Tel: 070-379 6842/Fax: 070-379 7403